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ONTARIO
LABOUR RELATIONS BOARD
REPORTS



April 1990

Ontario

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Unfair Labour Practice - Certification - Employer Support - Petition - Whether employer providing union with names and addresses of employees during organizing campaign prohibiting certification of union - Provision of this information not constituting "support" within the meaning of s.13 - Meeting of employees called by employer factor to consider in looking at voluntariness of petition - No violation of Act when lead hands circulating petition expressed personal views on the consequences of unionization - Failure of one of two originators/circulators of petition to testify another factor to consider - Petition not voluntary - Certificate issuing

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Unfair Labour Practice - Damages - Duty of Fair Representation - Remedies - Union settling discharge grievance at arbitration - Complainant not adequately advised of terms of settlement requiring her to present herself to work by specified date or her grievance would be dismissed - Breach of fair representation duty - Failure to advise employee of settlement terms which cause employee to fail to comply leading to dismissal of grievance found to be arbitrary conduct - Damages for loss of opportunity - Quantum to be worked out by parties

DENEAU, RHONDA; RE G.M.P, LOCAL #49; RE MULTI-FITTINGS 423

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Motion by counsel for the complainants to have the Board remove counsel for the union on basis of conflict of interest - Argued that counsel for respondent had acted on behalf of the complainants on grievances and had received confidential information in that capacity - Whether Board has the jurisdiction to compel a party to change counsel - Board discussing jurisdiction over professional conduct of barristers and solicitors - Board declining to entertain motion on discretionary grounds

WILSON, ANNA; RE O.P.S.E.U. AND O.P.S.E.U., LOCAL 110; RE FANSHAWE COLLEGE; RE ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES OF APPLIED ARTS AND TECHNOLOGY 481

2088-88-G International Brotherhood of Electrical Workers, Local Union 894, Applicant v. **Commercial Contracting Corporation of Canada, Limited,** Respondent

Construction Industry - Construction Industry Grievance - Damages - Union seeking enforcement of a collective agreement clause providing for a penalty of one percent per day compounded interest for the late payment of contributions to benefit plans - Whether payment required by clause is a penalty or an enforceable pre-estimate of losses - Board finding interest rate unconscionable and a penalty - Board declining to enforce penalty

BEFORE: *Inge M. Stamp,* Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn.*

APPEARANCES: *A. J. Ahee* and *R. Hill* for the applicant; *Donald S. MacKenzie* and *Peter K. Hrastovec* for the respondent.

DECISION OF THE BOARD; April 18, 1990

1. This is a section 124 application where the applicant is seeking enforcement of its Collective Agreement, specifically Clause 1001 dealing with late payments of contributions for Health, Welfare, Pension, Vacation Pay, Union Dues and Association Funds. Clause 1001, in the appendix covering the geographic jurisdiction of the applicant, reads as follows:

> **Clause 1001**
>
> Payments are to be calculated, monthly and remitted by the tenth (10th) day of the following month. Every Contractor who has not made payment on or before the twentieth (20th) day of the month, following the month worked, will be subject to a one per cent (1%) penalty, for each day late, applied to the unpaid balance, until all delinquencies and penalties are paid in accordance with the above procedures.

2. The amount owing, $137,507.50, was paid after the first day of hearing in this matter. What remains is a penalty of one per cent per day compounded for 23 days which amounts to $35,361.85 or $1,537.47 per day.

3. The respondent submits that this is not a legal rate of interest and that the Board should not enforce it. The respondent cited paragraph 4 of the *Interest Act* as the authority for its proposition that article 1001 cannot be enforced. Article 4 of the *Interest Act* states:

> 4. Except as to mortgages on real property, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

4. The respondent further submits that there was no evidence to show that the union, as a result of the late payment, incurred the kind of damages for 23 days that would amount to $35,361.85.

5. The applicant's position is that we are sitting as a Board of Arbitration under section 124 and have no power or authority to alter or disregard any clause in the Collective Agreement. Article 1307 of the Collective Agreement states:

1307 POWER OF BOARD

> The Board of Arbitration shall not have any power to alter or change any of the provisions of this agreement or to substitute any new provisions for any existing provision or to give any decision inconsistent with the terms and conditions of this Agreement.

6. It was not disputed that the respondent is bound to the Collective Agreement between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and The International Brotherhood of Electrical Workers and The IBEW Construction Council of Ontario. The respondent became bound to the agreement when it signed a voluntary recognition agreement. By operation of statute, the respondent became bound to the provincial agreement. The relevant work is covered by the provincial agreement.

7. The Business Manager of the International Brotherhood of Electrical Workers, Local Union 894 testified that only twice in fourteen years did his Local have to deal with this clause. He further stated that it is a penalty clause and is intended to penalize delinquent employers.

8. The respondent, during cross-examination of the applicant's witness, attempted to show that there had been some attempt made to work out a repayment schedule but the applicant's witness denied any such arrangement.

9. The only issue put before the Board is the enforcement of Clause 1001. The applicant took the position that notwithstanding the fact that it is a penalty as opposed to liquidated damages, the Board must enforce the Collective Agreement and does not have the power or authority to disregard or alter any clause in a collective agreement.

10. It was the applicant's position that the clause is not designed to enable the benefit funds or the union to make money, but to ensure that employers honour their commitment. Further, the applicant submits that the respondent knew what he was getting into when he bid on the work and became bound to the Agreement.

11. First let us deal with the issue of the enforcement of the penalty contained in Clause 1001. The applicant argued that it was not necessary to address the issue of damages since the collective agreement clearly set out the penalty to be assessed against any delinquent employer. In the instant case, the penalty for 23 days amounts to $35,361.85 or $1,537.47 per day on the principal amount of $137,507.50.

12. At one per cent compounded for each day late, the annual rate is in excess of 3000% with the penalty running into millions of dollars for a twelve-month period on the original amount outstanding. This is usurious when considered in the context of the possible losses incurred by the applicant. In the instant case, even using a most generous approach, it seems unlikely that any damages as a result of late payments to the various union benefit plans could result in damages of $35,361.85 over 23 days.

13. Contractors who withhold substantial benefit payments for one, two or more months have an unfair advantage over contractors who make timely payments pursuant to the collective agreement. The delinquent contractor has the added benefit of the use of this money to the detriment of the union benefit funds and the other contractors. The Board in *Beckett Elevator Company Limited*, [1983] OLRB Rep. Sept. 1391 had the following to say about "interest" on late payments:

> 29. ... an interest component is an important aspect of the measure of damages when an aggrieved party is able to establish that a sum of money should have been paid some months or years before. The interest component is not a penalty. It is part of the compensation for the loss

incurred, and that there is a cost or loss arising when money is not paid on time is obvious to anyone who has worried about the size of his accounts receivable.

14. The applicant's benefit plans should be compensated for any losses incurred due to the respondent's failure to make timely payments. However, the applicant did not address the issue in terms of damages but emphasized that the clause was intended to punish as well as discourage other employers from behaving in a similar fashion. The question of whether payments required under a clause such as 1001 are penalties or enforceable pre-estimates of losses arising from an employer's violation of the collective agreement was addressed in the Board's decision in *Parlay Construction Ltd.*, [1984] OLRB Rep. Aug. 1120. Paragraphs 5 and 6 of that decision states:

> 5. The general approach of the civil courts is to enforce an amount stipulated for breach of a contract if the amount in question is a genuine pre-estimate of damages, but not to enforce it (at least not beyond the amount of any actual damages) if it is, in fact, a penalty. The courts have also made it clear that the use of the terms "penalty" or "liquidated damages" in a contract is not conclusive. In the leading case of *Clydebank Engineering v. Don Jose Ramos Yzquierdo Y Castaneda* [1905] A.C. 6 a clause specified that for each week that a ship's delivery was delayed, a "penalty" of 500 pounds would have to be paid. The Earl of Hallsbury L.C. analyzed the clause in question as follows:
>
> > "The first objection is one which appears upon the face of the instrument itself, namely, that it is a penalty, and not, therefore, recoverable as a pactional arrangement of the amount of damages resulting from the breach of contract. It cannot, I think, be denied - indeed, I think it has been frankly admitted by the learned counsel - that not much reliance can be placed upon the mere use of certain words. Both in England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word "penalty" on the one side, or "damages" on the other, would not be conclusive as to the rights of the parties."
>
> 6. In ascertaining whether amounts referred to in a collective agreement are a penalty or a pre-estimate of liquidated damages, a helpful guide is the reasoning of the United States 7th Circuit Court in *United Order of American Bricklayers and Stone Masons Union No. 21 v. Thorleif Larsen & Sons, Inc.* 89 LRRM 3113. In that case, a collective agreement contained a clause that made the employer liable for an additional 10% payment on failure to remit welfare and benefit fund contributions in a timely fashion, as well as for payment of all these monies. In construing this clause, the court carefully considered the question of penalties vis-a-vis liquidated damages in the context of an agreement arrived at under a collective bargaining regime. Pell C. J. set out the requirements of liquidated damages as being two-fold:
>
> > "(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
> >
> > (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation".
>
> It was the view of the court that the union's anticipated damages would go beyond mere loss of the use of funds, but would also include increased administrative costs from collection efforts, the cost of attempts to forecast receipts, possible loss of benefits to employees and harm to labour-management peace. In the circumstances, the Court concluded that it would be just and equitable to regard the collective agreement provision as a genuine pre-estimate of damages and to enforce it. The essential part of the Court's award is set out below:
>
> > "It is clear that the defendant contractually agreed to make the contributions and to pay an additional 10% if the payment was not made in time. This would appear to be 'a part of the consideration which [the appellee] agreed to pay for services performed by his employees.'
> >
> > An underlying purpose of a labor agreement is to provide for a period of industrial

> harmony between labor and management. It is in keeping with the spirit of our federal relations policy that labor contracts are to be enforced as negotiated by the parties. While the difficulties of the advance accurate estimation of damages are otherwise adequately demonstrated in the present case, we do note the difficulty, if not impossibility, of quantifying the intangible damages to labor-management harmony resulting from failure to comply with the provisions which have been hammered out in bargaining sessions.
>
> We are satisfied that the plaintiff has clearly established that the harm caused by the breach is one that is very difficult of accurate estimation. That having been established, we are unable to say under the particular circumstances of this negotiated labor contract that the amount so fixed is not within the range of reasonable forecast of just compensation for the harm caused by the breach."

15. A penalty is "a sum that is fixed in advance as being subject to forfeiture or payment in the event of non-performance of a contract, or some kind of misperformance" (Fridman, *The Law of Contract in Canada* (Carswell, 1986, 2nd ed.)). The common law draws a distinction between penalty clauses (which are unenforceable) and "genuine pre-estimates" liquidating damages for a breach of contract (which are enforceable). As stated in *Canadian General Electric Co. v. Canadian Rubber Co.* (1915), 27 D.L.R. 294, at 295 (S.C.C.):

> A penalty is the payment of a stipulated sum on breach of the contract irrespective of the damage sustained. The essence of liquidated damages is a genuine covenanted pre-estimate of damage.

Mere use of the words "liquidated damages" or "penalty" is not conclusive (*Shatilla v. Feinstein*, [1923] 3 D.L.R. 1035 (Sask. C.A.)). Rather, the courts will consider the whole agreement in an effort to discern whether the sum stipulated is a penalty or liquidated damages. In *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* [1915], A.C. 79 at 86 (H.L.), Lord Dunedin laid down the following general rules for determining whether a clause is penal in nature:

> (1) The sum in question will be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach.
>
> (2) If the obligation of the promisor is to pay a certain sum of money and it is agreed that if he fails to do so he will pay a larger sum, this larger sum is a penalty.
>
> (3) If there is only one event, on which the sum agreed is to be paid, the sum is liquidated damages.
>
> (4) If a single lump sum is made payable upon the occurrence of one or more or all of several events, some of which may occasion serious and others only trifling damages, there is a presumption, but no more, that the sum is a penalty. But not necessarily if it is difficult to prove actual loss.

16. Courts and commentators alike have acknowledged that in relieving against penalty clauses, the courts are interfering with freedom of contract (see Corbin, *Contracts* para. 1055; Waddams, *The Law of Contracts*, 2nd ed., at 334). In *Elsley v. J.G. Collins Ins. Agencies Ltd.* (1978), 83 D.L.R. (3d) 1, the Supreme Court of Canada (at 15) said:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

In view of the fact that a refusal to enforce a penalty clause potentially encroaches on the principle of freedom of contract, Waddams, *supra* (at 336) suggests that:

> The question in issue should not be the accuracy of the pre-estimate, but the reasonableness of the agreement. These are not always the same. Certainly, the genuineness of the pre-estimate is an important consideration in determining the reasonableness of the agreement but it should not be conclusive.

17. The Supreme Court of Canada decision in *Dimensional Investments Ltd. v. R.* [1968] S.C.R. 93 (at 101) demonstrates that a clause which is penal (in the sense that it commands a sum wholly disproportionate to the damage suffered) will not necessarily be unenforceable if it is not also "unconscionable". In this regard, Ritchie J. stated:

> Whether a provision in a contract is penal or not depends upon the construction of the contract but the question of unconscionability must depend upon the circumstances of each case at the time when the clause is invoked.

18. The penalty payment for the 23 day late payment of the principal sum of $137,507.50 is $35,361.85 or $1,537.47 per day. This clause in the union's own view is designed to punish and deter delinquent contractors. A one per cent daily compounded interest rate in the circumstances of this case appear to be out of proportion to any possible damages suffered. The benefit funds should be compensated for any losses due to late payments. This decision is not to be interpreted to say that a clause in a collective agreement cannot reflect a genuine pre-estimate of damages incurred by late payments. In this particular case, the interest rate of one per cent per day compounded is penal in nature as well as unconscionable. As a result, the Board declines to enforce the penalty of one per cent per day compounded.

19. Having regard to the foregoing, the Board finds that the respondent has failed to comply with the terms of the collective agreement. As a result of this failure, the applicant's benefit plans were deprived of the use of these funds for 23 days. In order to compensate the benefit plans, the Board, having regard to *Beckett Elevator Company*, *supra*, awards interest on the late payment on the basis of the chartered banks' prime time rate at the time the application was filed. The respondent shall pay forthwith to the applicant on behalf of the benefit plans interest at the applicable chartered banks' prime time rate for 23 days on the late payment.

20. In view of the conclusions we have reached on the penalty clause, it is not necessary to address the issue of the applicability of the *Interest Act* in these circumstances.

CONCURRING OPINION OF BOARD MEMBERS H. KOBRYN AND W. N. FRASER; April 18, 1990

1. When the Board has to adjudicate on this type of clause which is the subject of this dispute, we have to consider why such a clause was negotiated by the parties into this collective agreement and why it is so stringent.

2. When you look to the reasons you find they are two-fold:

> One, from the Union's point of view, it's there primarily to protect their members who are employees of the various employers bound by this collective agreement. The fringe benefits negotiated by the parties are submitted to the respective funds by employers within the time period specified in the collective agreement, so that the employees will realize the full benefit of these earned contributions when they are due.
>
> Two, from the employer's point of view, especially those employers who live by the letter of the collective agreement and submit the negotiated fringe

benefit monies on time, they are in a competitive disadvantage to their competitors who do not make contributions on time and have the use of these monies over a lengthy period.

3. The facts of life in the construction industry are that subcontractors who are successful bidders have to finance the project by buying the necessary material for the project up front and paying the labour costs. This is almost always financed by loans from financial institutions. The high rates of interest of those loans cause financial costs which are quite substantial and must be included in their bid price. Added to this cost is the fact that it may be a lengthy period before they receive payment for the work performed from the Owner or the General Contractor. The cost of money borrowed to finance the project becomes a major cost item to the employer's operations. Anyone who can avoid this cost by using the monies which are due to the fringe benefit funds for a lengthy period has a definite competitive advantage over contractors who make timely contribution payments.

4. This sort of advantage must be avoided at all costs so that every contractor bound by this collective agreement plays from a level playing field. That is why these types of clauses in construction industry collective agreements are so important to the parties who negotiated them and must be acknowledged and protected to the full extent of the law.

0731-89-R; 0832-89-U United Steelworkers of America, Applicant v. **Continuous Mining Systems Limited,** Respondent v. Group of Employees, Objectors; United Steelworkers of America, Complainant v. Continuous Mining Systems Limited, Respondent

Certification - Employer Support - Petition - Unfair Labour Practice - Whether employer providing union with names and addresses of employees during organizing campaign prohibiting certification of union - Provision of this information not constituting "support" within the meaning of s.13 - Meeting of employees called by employer factor to consider in looking at voluntariness of petition - No violation of Act when lead hands circulating petition expressed personal views on the consequences of unionization - Failure of one of two originators/circulators of petition to testify another factor to consider - Petition not voluntary - Certificate issuing

BEFORE: *Louisa M. Davie,* Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald.*

APPEARANCES: *Keith Oleksiuk* and *Wayne Fraser* for the Applicant/Complainant; *R. Little* and *Dale Letts* for the respondent; *K. R. Valin* and *Richard Liscum* for the group of employees.

DECISION OF THE BOARD; April 24, 1990

1. Although filed on June 16, 1989, the events giving rise to this certification of application appear to have started well before that date. In 1988, during the negotiations for the renewal of a collective agreement between Inco and Local 6500 of the United Steelworkers of America, the subject of the unionization of Continuous Mining Systems Ltd. ("CMS") came up. CMS is a wholly owned subsidiary of Inco. It was established in 1984 and is in the business of marketing, developing and designing mining equipment. When the subject was raised during the Inco negotia-

tions, the employees at CMS were not represented by the United Steelworkers of America, ("the Steelworkers" or the "Union") or any other trade union. The Steelworkers wanted to change that. Inco, which has had a long collective bargaining relationship with the Steelworkers in respect of its own employees, indicated that whether or not the employees at CMS were represented by the Steelworkers was a choice which employees at CMS had to make. It was a right which management at Inco or CMS could not confer upon the Steelworkers.

2. As a result of discussions during the Inco negotiations the following letter from Dr. Walter Curlook, Chairman of the Board of CMS and Executive Vice-President of Inco, Mining Division, was sent to Leo Gerard, Director, District 6 of the Steelworkers on May 27, 1988:

> We wish to advise that the management of CMS recognizes both the rights of its employees with respect to union representation and the right of the United Steelworkers of America to make all reasonable efforts to organize them.
>
> On the understanding that the Company must act lawfully at all times, we are prepared to provide your union with the names and addresses of our employees so that you may approach them for the purpose of joining the union in order to obtain certification from the Ontario Labour Relations Board. To the extent permitted by law, we are also prepared to provide a union representative with an opportunity to speak to employees at their place of work.

3. A list of names and addresses of the employees was provided to the Steelworkers in May 1988. In addition, Dr. Curlook's letter was distributed by CMS to all its employees at a monthly employee meeting and discussed at that time. A year later, after this application was filed, but prior to the terminal date, an updated list of names and addresses was again provided to the Steelworkers. The Steelworkers did not however contact CMS to arrange for a method by which it could avail itself of the "opportunity to speak to employees at their place of work". During the organizing campaign which culminated in this application union representatives did hand out leaflets to employees as they were entering and exiting the plant. There is however a dispute in the evidence tendered by the parties whether, at that time, the invitation to speak to employees was extended quite as warmly as in Dr. Curlook's letter or whether union representatives were told, on one occasion at least, to get off the company's property or the police would be called. It is unnecessary to resolve that dispute. The evidence discloses that a number of representatives of the Steelworkers did attend on company premises on several occasions to hand out leaflets to employees without incident and without police attendance. The text of Dr. Curlook's letter was prominently referred to in the union's leafletting campaign.

4. Dr. Curlook's letter and the giving of a list of the names and addresses of employees to the Steelworkers form the basis of the assertion by the group of employees that the applicant should not be certified by reason of section 13 of the *Labour Relations Act* ("the Act") because the employer "has contributed ... other support" to the union. That is only one of the outstanding issues raised in this application. The others include the duties and responsibilities of Rick Poitras, whom the applicant claims exercises managerial functions within the meaning of section 1(3)(b) of the Act and cannot therefore be included in the bargaining unit found to be appropriate by the Board in its decision dated July 12, 1989; the voluntariness of a "petition" signed in opposition to this application; and certain allegations that the respondent has violated section 64, 66(a), 66(c) and 70 of the Act. In earlier decisions the Board has already dealt with the status of the trade union, the bargaining unit description, a non-pay allegation and the status of certain other individuals whom the union asserted exercise managerial functions.

The Section 13 Issue

5. The representative for the objecting employees argued that the fact that CMS provided

a list of names, addresses and telephone numbers to the Steelworkers constitutes employer "support" within the meaning of section 13 of the Act and that therefore the applicant cannot be certified. Section 13 provides as follows:

> 13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code, 1981* or the *Canadian Charter of Rights and Freedoms*.

6. In support of this submission, we were referred to *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509. As noted in *Tri-Canada Inc.* there can be no dispute that a list of employees' names, addresses and telephone numbers can be of real assistance to an organizing union. It does not necessarily follow however that supplying that type of information constitutes "other support" within the meaning of section 13. Each case must be decided on its own facts and in keeping with the purpose and intent of section 13.

7. The following passage from *Edwards v. Edwards* (1952), 52 CLLC ¶17,027 is often cited in Board jurisprudence as authority for the rationale which underscores section 13 and the approach the Board should take in dealing with that section:

> The section is clearly aimed at "company-dominated" trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right confined by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of *such a character or are of such proportions* that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, *the particular applicant is not truly the chosen bargaining agent of the employees concerned*. It is argued that because of its explicit language, section [13] need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its *obvious intent*: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.
>
> [emphasis added]

8. This passage was quoted with approval in *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 where the Board then held;

> The need to be cautious and purposive rather than literal in its interpretation and application of section 13 has been a regular theme in the Board's decisions. If it were otherwise, section 13 could be used by employers to accomplish the very thing it was intended to prevent: interference in their employees' right to be represented by the trade union they select on a majoritarian basis.
>
> 75. The Board has on several occasions addressed the proposition that involvement in a trade union's affairs or organizing campaign by persons who exercise managerial functions within the meaning of subsection 1(3)(b) amounts to employer support within the meaning of section 13.... Later decisions, however, rejected the automatic application of section 13 in these circumstances, as the Board noted in *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep, May 639, where (at paragraph 6) it said this about what is now section 13:
>
> > The purpose of the section, in keeping with the scheme of the Act, is to maintain the necessary arm's length relationship between employers on the one hand, and trade unions, as representatives of employees, on the other.
>
> ... The purpose of the section is to prevent the certification of a trade union which is party to a

> "sweetheart deal" with an employer or is the recipient of employer support so that it does not owe its sole allegiance [sic] to those whom it is certified to represent. The Board has consistently applied the section having regard to its underlying purpose.

(For a purposive approach to section 13 in quite another context see *University of Toronto*, [1988] OLRB Rep. March 325 where the Board found that continued access to employees through an internal mail system by an employee association which was seeking to assist CUPE's organizing campaign was not a contravention of section 13 of the Act).

9. The *Tri-Can* decision cited by counsel found the provision of an employee list to an employee organization to be employer "support" precisely because it adopted such a purposive approach to section 13. At paragraph 15 of the decision the Board states:

> 15. The bargaining process between employers and employees always implies, in addition to their common interest, some degree of conflict between the immediate economic interests of the bargainers - the payer and receiver of wages. This conflict of interest will necessarily co-exists [sic] with their common interest in the welfare of the enterprise from which they both derive their income; and we do not mean to suggest that harmonious relations do not exist between employers and trade unions. But short-run conflicts of economic interest are inevitable, and if they are to be resolved through the process of collective bargaining, it is highly inappropriate for the agency which represents one party to the bargain, to be in any measure under the influence of the other. Collective bargaining by its very nature requires an arm's length relationship between the bargaining parties, and there are a number of statutory provisions designed to ensure that this is the case.

10. After reviewing the unique facts in that case including (a) managerial involvement in the circulation of a petition against another trade union several weeks earlier by the same employees who subsequently formed the employee association (the President of the employee association was permitted to hold a meeting in opposition to that union on company premises, the petition was typed for him by an office employee and freely circulated on company premises and company time), (b) the formation of the association as a means to frustrate another union's organizing campaign, and (c) a general opposition to unions and to collective bargaining by the President of the employee association, the Board concluded at paragraph 22:

> 22. It is clear that the possession of a list of employee names and phone numbers is a significant asset to an individual contemplating the formation of a trade union, and in the absence of any explanation from Mr. Malaca, we must conclude that he was actively seeking to assist Koslowsky in his efforts to form the intervener. It is hardly likely that he would have done the same for a truly independent union such as the U.A.W. (certainly counsel's reticence with respect to the list is the more usual employer reaction), and we cannot find on the evidence that the support was given either inadvertently, or by an individual in a managerial capacity acting on his own, and contrary to the employer's interests. On the contrary, the fact that the employee list was so readily given to the intervener raises precisely the kind of question concerning its independence to which section 13 is directed. And where, as here, the intervener has no previous bargaining history, and was formed in secret, by a small group of union opponents, in the shadow of another union's organizing campaign, it is incumbent upon those employees, and the particular responsibility of the Board, to ensure that section 13 is not contravened. This does not mean that union opponents may not react to an organizing campaign by forming another employee organization. It is simply that if they do so - and especially in circumstances similar to those in the instant - the Board must give careful consideration to any evidence suggesting a non-arm's length relationship with the employer, and to any allegations or evidence respecting the voluntariness of the employee organization's membership evidence.

11. On the facts of that case, the Board found that in supplying an employee list to the association the arm's length relationship underlying the collective bargaining regime and the independence of the employee bargaining agent necessary for true collective bargaining had been compro-

mised. Similarly, such support cast doubt upon the voluntariness of the membership evidence which had been solicited by the employee association.

12. The facts of *Tri-Can* are readily distinguishable from the present. Unlike the case in *Tri-Can*, the trade union applicant was not formed to thwart another union's organizing attempts. Unlike the situation in *Tri-Canada*, the applicant trade union in this instance is desirous of conducting meaningful collective bargaining and indeed, has a long history of arm's length collective bargaining with the parent company of CMS. (A collective bargaining relationship which has not always been free of acrimony and dispute and has not proven to be the "sweet-heart" relationship which section 13 is designed to avoid).

13. In all of the circumstances we find that giving the list of names and addresses to the Steelworkers has not transformed the Steelworkers into a union which "is not qualified to act on behalf of employees in their relations with the employer because of the nature of its relationship with [that] employer." (To use the language found in *Edwards*, *supra*). We find that providing the Steelworkers with a list of names and addresses of employees does not constitute "support" within the meaning of section 13 of the Act. In the present circumstances, section 13 does not prohibit the certification of the Steelworkers.

The Status of Richard Poitras

14. Having regard to the entirety of the evidence, on balance, we are of the view that Mr. Poitras does not exercise those types of managerial functions which should result in his exclusion from the bargaining unit by reason of section 1(3)(b) of the Act. We are of the view that Mr. Poitras is a lead hand and exercises the responsibilities typical of a lead hand. We view Mr. Poitras to be in much the same position as Messrs. Liscum, Mantha and Poulin, persons whom we have already found to be properly included in the bargaining unit. For the same reasons enunciated in our decision dated October 16, 1989 in respect of Messrs. Liscum, Mantha and Poulin, we have concluded that Mr. Poitras is not the first line of management and does not have the type of control or authority over other employees or the economic lives of his fellow employees as to render him "managerial" within the meaning of the Act.

The Petition and the Unfair Labour Practice Complaint

15. We have determined to address these two issues together because, the facts which form the basis of the union's assertion that the petition does not represent the voluntary wishes of those who signed it, and its assertion that the respondent has violated the Act, are similar and closely tied together.

16. On the evening before the Steelworkers filed the application for certification, Mr. Richard Liscum found out about the union's organizing drive from Mr. Michaud, one of the employee collectors involved in this organizing campaign. Mr. Liscum stated that he was caught off-guard for although he had heard of the union's attempts the year before, the news of the current organizing drive was unexpected. Mr. Liscum spoke with some other employees that night. Those employees either confirmed the organizing drive and indicated they had signed cards, or alternatively that they were unaware of the campaign and had not been approached.

17. Mr. Liscum went home and gave the matter further thought. The following night he called Raymond Poulin, the lead hand who worked the cross-shift. By this time, Mr. Poulin was also aware of the union's campaign. The two men discussed the matter and decided to find out how many people were opposed to the union and then "start some legal action".

18. Mr. Liscum testified that Mr. Poulin had some familiarity with trade unions and certification applications because of previous experiences. In fact, Mr. Poulin knew of a lawyer who the two men could see to get some advice. Mr. Poulin told Mr. Liscum that concerned employees could sign a petition but to do it "the legal way" they should go see this lawyer. It was Ray Poulin who first spoke to Mr. Liscum that employees could oppose the union through a petition. Thereafter, when Mr. Liscum spoke to other employees he spoke of the possibility of a petition. He would indicate to employees who asked about the matter that "we're working on it. We'll see what we can do."

19. At some point in time after this original telephone conversation, Mr. Poulin advised Mr. Liscum that the lawyer he knew, Mr. Ken Valin, would provide the men with the petition which the employees could sign. Mr. Poulin attended at Mr. Valin's office to pick up the petition. Mr. Liscum did not go to Mr. Valin's office and was not present when the petition was drafted.

20. Approximately one week after their telephone conversation, on Thursday, June 22nd, Mr. Liscum met Mr. Poulin at the local Burger King. The men discussed the petition. Mr. Poulin instructed Mr Liscum about the advice he had received from Mr. Valin in respect of the circulation of the petition. Mr. Poulin told Mr. Liscum that the petition had to be circulated on the employees' own time, off company premises and without involvement from management. It had previously been agreed that Mr. Liscum would circulate the petition.

21. From the Burger King Messrs. Liscum and Poulin travelled to a local Harvey's restaurant. There Mr. Liscum obtained the signatures of nine employees on the petition. While there, Mr. Jeff Hansellman volunteered to be a witness to Mr. Liscum's circulation of the petition. Mr. Liscum did not know how people knew to be at the Harvey's to sign the petition stating "that was Ray Poulin's part. I could not report on that issue". Similarly, he did not know what Mr. Poulin said to employees in order to ensure they were at the Harvey's to sign the petition.

22. From the Harvey's restaurant, Messrs. Liscum, Poulin and Hansellman travelled to a nearby Country Style Donuts and obtained the signatures of four more employees on the petition. Mr. Liscum was unable to testify about how these employees knew that he would be at the Donut Shop. He did testify that these employees would have known to go to the Donut Shop "... through my cross-shift lead hand, Ray Poulin" but again did not know what Ray Poulin had said to them.

23. It took approximately two hours from the time that Mr. Liscum met Mr. Poulin at the Burger King (at approximately 11:20 a.m.) until the time he obtained the last signature at the Donut Shop. June 22, 1989 was a regular work day for Mr. Liscum. After Mr. Liscum obtained the last signature he returned to work. Mr. Liscum had obtained permission not to be at work during this time from his foreman, Gus Lemieux. He told Mr. Lemieux he had some personal business to take care of. He did not advise any of the employees that he had been given time off work to attend to personal business.

24. After work that day (and after the employee meeting to which we will refer later herein) Mr. Liscum attended with Jeff Hansellman at Fielding Memorial Park. There in the space of a little over sixty minutes (from 3:30 p.m. to 4:36 p.m.) they witnessed the signatures of thirty-two people to the petition. Mr. Hansellman witnessed all the signatures. Mr. Hansellman was scheduled to work the afternoon shift on that day, and, from the evidence was obviously late for the commencement of this shift at 3:30 p.m. Mr. Hansellman did not ask for permission from anyone to come in late and "was just late that day". Mr Liscum testified that people would have known to be at Fielding Memorial Park because by this time people in the plant were aware of the petition. He indicated that with "word of mouth" it "flew from there". At the park, Mr. Liscum

explained to employees that he had a petition "against" the Steelworkers and that he was representing the petitioners.

25. That evening, while Mr. Hansellman was on his lunch break from 9:30 p.m. to 10:00 p.m., the two men witnessed two more persons sign the petition at a local Pizza restaurant. It was Mr. Hansellman who arranged for these persons to be at the restaurant on that day.

26. The following day, shortly after 12:00 noon, Mr. Liscum and Mr. Hansellman witnessed two more signatures at the Country Style Donut. Mr. Hansellman was not scheduled to work that day. Mr. Liscum was scheduled to work that day but only worked until noon. He again had asked for some time off for personal reasons as he was in the midst of re-mortgaging his house and needed to see his lawyer and Bank Manager. Mr. Liscum was not asked to give a reason in support of his request for time-off on this occasion. The two employees did not ask any questions about the petition. The employees knew to attend at the country style "through Ray Poulin" although Mr. Liscum was not aware of what Mr. Poulin had said to the employees. Later that afternoon, Messrs. Liscum and Mr. Hansellman attended at the residences of two other employees and obtained their signatures on the petition.

27. On Sunday, June 25th, three more people signed the petition. Messrs. Liscum and Hansellman testified that each of those three persons signed at Fielding Memorial Park. It was Mr. Liscum's evidence that this occurred at the end of a special overtime shift which he had worked that Sunday. In direct contradiction to that evidence the union called Terry McQuillan. Mr. McQuillan testified that, notwithstanding the fact that he wrote on the petition next to his signature that he signed the petition at 9:00 p.m. at Fielding Memorial Park, he in fact signed it in the plant parking lot earlier that evening. Mr. McQuillan stated that he wrote Fielding Memorial Park because Mr. Liscum told him to write either that or Country Style Donut or "anything but company property".

28. Mr. McQuillan's testimony was supported by Mr. Brian Bernier who testified that he drove Mr. McQuillan to and from work that day. Mr. Bernier testified that he drove Mr. McQuillan home that evening, at about 8:20 p.m., did not stop at Fielding Memorial Park, and stayed at Mr. McQuillan's home for roughly one hour. Mr. Bernier also testified that when he left work that evening with Mr. McQuillan, Mr. Liscum was still at the plant.

29. The last two signatures on the petition were obtained on Monday, June 26, 1989. Those persons signed off company premises at a time when Mr. Liscum was not scheduled to work. Mr. Hansellman was scheduled to work on that day. The first of the two signatures was obtained at 12:10 p.m. while Mr. Hansellman was on his scheduled lunch break. The other was obtained shortly thereafter at a time when Mr. Hansellman should have been at work. Mr. Hansellman however, had advised his lead hand (Ray Poulin) that he needed some personal time-off and that he might be late getting back to work. Again, it was Mr. Poulin who had arranged for Mr. Liscum to meet the first of these two signatories on Fielding Road. Mr. Liscum did not know what Mr. Poulin had told these signatories about the petition.

30. There were no managerial persons present when any signature was obtained on the petition. Mr. Liscum testified that he did not discuss the petition with any member of management. The evidence discloses that while the signatures were obtained on the petition there was very little discussion. Employees generally did not ask any questions about the petition which they were signing. Persons did ask what would happen next or make comments that they hoped it would do some good. Mr. Liscum kept control of the petition from the moment he received it from Mr Poulin until he delivered it to his counsel's office. Mr. Liscum attended the first day of hearing scheduled for this matter in Toronto and requested personal time off for that without indicating the reasons why he wanted the time off. He has not been reimbursed and has not made any arrangements or agree-

ments with his employer with respect to his legal expenses, his expenses for attendance at the hearing or the wages he has lost by reason of his attendance at the hearing. Mr. Liscum testified that the expenses were to be paid by employee contributions. He however was not involved in the collection of those contributions, "other people" did that. He indicated that his information about monies collected came from discussions he had with the other lead hand, Ray Poulin.

31. Ray Poulin did not testify. In addition to Mr. Liscum's testimony about the involvement of Ray Poulin in the petition, the Board also heard the evidence of Ken Bergeron who was called by the trade union. Mr. Bergeron testified that he had observed Mr. Poulin walk around the shop with a copy of the Notice of the Union's Application in his hand. Later that evening Mr. Poulin approached Mr. Bergeron to ask if he wanted to sign a petition. During the course of that conversation Mr. Poulin told Mr. Bergeron that it had been his experience that "any organizer or top people trying to bring in a union lose their jobs". The two men discussed the pros and cons of unionization. Mr. Bergeron indicated he needed some time to think. Later that night Mr. Poulin again approached Mr. Bergeron. During the course of that conversation Mr. Bergeron asked Mr. Poulin "if he [Poulin] could save my [Bergeron] job if I [Bergeron] would sign the petition." Mr. Poulin responded "he [Poulin] would sure hope he [Poulin] could". This evidence was not challenged in cross-examination and was not contradicted in any other manner.

32. We turn now to that evidence which relates specifically to the section 89 complaint. There are essentially three aspects to that complaint; statements allegedly made by Mr. Letts at a meeting of all employees, statements allegedly made by Mr. Letts during private conversations with Gaston Michaud and Ren 2i Sauve, and statements allegedly made by Mr. Poitras. We turn first to the employee meeting.

33. The first day on which the petition was circulated, June 22, 1989, was also the day that the respondent conducted one of its usual profit sharing meetings with employees. These meetings are regularly conducted by CMS to bring employees up-to-date about the company's profit sharing plan and to discuss matters of mutual concern or interest. The applicant does not assert that the holding of this meeting was an unfair labour practice but alleges that certain statements made by Mr. Letts during the meeting violated the Act. On June 22, 1989, the profit sharing meeting for the day shift of which Mr. Liscum was then a part was held in the lunch room at 3:00 p.m. The afternoon shift of which Mr. Hansellman was a part had its profit sharing meeting scheduled for 3:30.

34. We heard the evidence of twelve witnesses including Mr. Letts about what was and was not said and done during the meeting. On a key allegation, namely comments made about a plant expansion, evidence of the witnesses called by the trade union, stood in stark contradiction to the evidence of those witnesses who testified on behalf of the respondent or the objecting employees.

35. It is alleged in the section 89 complaint that during the meeting "Letts advised employees that the respondent's profit sharing plan could be cancelled as a result of the union's application for certification". The evidence does not support this allegation. We find instead that an employee asked whether the profit-sharing plan could be taken away. Mr. Letts respondent that the profit-sharing plan was like any other benefit which the company could, if it so desired, adjust or alter from time to time as benefits were added or deleted. Mr. Letts added however that the profit-sharing plan was a particularly good plan for the company and its employees. The plan allowed the company to attract and retain employees. To cancel the plan would therefore not be a good business decision and the company had no plans to cancel this benefit.

36. The one serious area of dispute arising out of the June 22, 1989 meeting relates to an answer given by Mr. Letts in response to a question from Mr. Randy Wilson who asked whether the planned expansion of the plant was cancelled. Mr. Letts testified that he responded by stating

that "No, it wasn't cancelled, it was on hold until mid-July". Mr. Letts' denied the applicant's allegation contained in the section 89 complaint filed that he "advised employees that the plant expansion was on hold until the hearing date of the instant application for certification." He testified that he made no reference to either the union, the organizing campaign, the application for certification or the hearing date at any time during the course of this meeting.

37. Mr. Letts did not at the time of the meeting explain why the expansion was postponed. Before this Board he testified however that although the Provincial Government (Nor Dev) had approved a loan required for the planned expansion, CMS had not received approval for a loan from the Federal Government (Fed Nor). Mr. Letts however had spoken to Mr. Gaston Demers a member of the Fed Nor Board. Mr. Demers had indicated to Mr. Letts that the application would be dealt with at the next Fed Nor Board meeting in July. Thereafter CMS would know whether it would receive the loan. Mr. Letts testified the question of the loan from Fed Nor was a very sensitive issue and he was concerned that any information regarding the loan might affect the Fed Nor application. He further stated that if the loan was approved he could proceed with the expansion. On the other hand, if it was rejected (as it ultimately was) he would have to go back to the CMS Board of Directors and request additional equity financing to replace the loan.

38. Mr. Demers testified. He indicated that the CMS application was dealt with by the Fed Nor Board at its meeting on June 13th. The Board did not approve the application and Mr. Demers advised Mr. Letts of this fact shortly thereafter (and before the June 22nd meeting). Mr. Demers further testified however that he advised Mr. Letts that these decisions could be appealed. Moreover, Mr. Demers testified that in view of the importance of the matter to the Sudbury community he recommended that Mr. Letts appeal the decision to the subsequent meeting of the Fed Nor Board. That meeting would take place July 17th to 19th. The matter was left with Mr. Letts who indicated to Mr. Demers that he would take it under advisement and discuss it with his staff and the Board of Directors and determine what to do. CMS did not in fact appeal the decision. The application was not discussed at the July Fed Nor meeting and Mr. Demers did not speak to Mr. Letts again until shortly before Mr. Demers testified before this Board.

39. As indicated, many people testified about the meeting. Without detailing their evidence it is sufficient to note that each witness had a somewhat different recollection of what Mr. Letts said or did in response to this question from Randy Wilson. Mr. Wilson himself testified that Mr. Letts answered the question by stating that "it [the expansion] was on hold until July 17th." When Mr. Wilson asked "what was July 17th?" Mr. Letts did not respond but merely "shrugged" his shoulders. Mr. Wilson testified that at that time Mr. Letts had the agenda for the meeting in his hands. Mr. Wilson did not press the issue any further because "I [Mr. Wilson] figured it was none of my business. I don't run the place." Mr. Wilson further testified that he did not at any time or for any reason think the expansion was dependent upon or had anything to do with the union or the organizing campaign.

40. Other witnesses called by either the applicant or the objecting employees had different recollections of the meeting. They testified that Mr. Letts either referred specifically to July 7th, (the first date of the hearing of this application for certification and the date referred to in the "green sheets" - Form 6 Notice to Employees - posted on the bulletin board) or did not specifically refer to any date to which the planned expansion was postponed. These witnesses testified that Mr. Letts either pointed to his left to where the green sheets were posted, his right to where the green sheets were posted, or did not point at all. He either moved about during the meeting or moved very little. Mr. Letts may or may not have shrugged in answer to the question depending on each witness' recollection. Similarly, he either did or did not have a piece of paper in his hand. The same witnesses either testified that Mr. Letts advanced no reason for the postponement [as was the

case of Mr. Robertson and Mr. Willett] and in this regard it was asserted by the union's witnesses that the pointing to Form 6 was reason enough [as was asserted by Mr. McQuillan, and Mr. Gagnon]; referred to a postponement "due to business reasons" and thereafter pointed to the notice [Mr. Michaud and Mr. Aubin]; specifically referred to the postponement "until he found out what was going to happen to the certification of the union" [Mr. Leveille]; specifically stated that he was waiting for funding or a grant [Mr. Brisson and Mr. Bouchard]. Whatever else may have been said, it is evident that during the meeting no reference was made to any decrease in employment levels at the existing operations. There is no evidence to suggest that the job security of employees then employed at CMS was in any way at risk because of a postponement of the plant expansion.

41. In our view, in the circumstances it is not unusual that each witness had a different recollection of the meeting. There were approximately sixty to seventy employees in the lunch room for this meeting. It is highly likely that, four to eight months later, each would have a different recollection of what he or she heard at that meeting. In addition, that recollection would probably be influenced (both at the time of the meeting and in testimony before the Board) by a number of physical environment factors (i.e. the person's position in relation to Mr. Letts) as well as a certain degree of self interest. That is not to say that the witnesses before this Board were deliberately untruthful. Human nature being as it is, it is not unusual that people see and hear what they want to see and hear. The frailties of human nature are such that a witness' recollection of events is shaped not only by the circumstances at the time, but undoubtedly their mental restructuring of events several months later while in the witness box. In that mental restructuring a witness may either consciously or unconsciously have regard to circumstances which occurred after the event which they are asked to recollect. In this case, the circumstances at the time include the union's application for certification which, by the time of this meeting, was a known fact, discussed by all employees and was a "hot" item in the plant. The circumstances after the event include the denial of funding by Nor Dev. CMS received formal written notification on September 29, 1989 that its application had been rejected. Nevertheless, the plant expansion was implemented.

42. Having regard to all of the evidence in respect of this meeting, and indeed to the totality of the evidence and the inferences which may reasonably be drawn from the totality of that evidence, we find that Mr. Letts did not, during the course of this meeting advise or indicate to employees that the plant expansion was on hold until the hearing date of the application for certification or because of the Steelworkers' application. We find that Mr. Letts did advise employees that the expansion was on hold. We accept that he did so because of the issue of the Fed Nor financing. In our view, there is no inconsistency or contradiction in the evidence of Mr. Demers and Mr. Letts. Although Mr. Letts may have been advised of the rejection of the application by Fed Nor prior to the June 22nd meeting, he was also advised to appeal that rejection to the next Fed Nor Board meeting. He indicated he would take that under advisement and discuss it with appropriate persons. At the time of the June 22, 1989 meeting therefore the issue of Fed Nor financing and the options available to CMS if that financing was not forthcoming was still unresolved from Mr. Letts' perspective. Mr. Letts also knew that if he pursued the Fed Nor financing it would be dealt with in mid July. As the matter was still open it was not unusual for Mr. Letts to say very little about the expansion other than that it had been postponed until some time in mid-July.

43. Moreover, in view of all of the evidence and circumstances which existed at the time, (including Dr. Curlook's letter, the conversations between Mr. Letts and individual employees referred to herein, the stage of the union's campaign and its application for certification, and generally the respondent's conduct during that campaign) we concur with counsel for the respondent that Mr. Letts "would have had to have taken leave of his senses" and would have been "suicidal" to deliberately link the planned expansion with the union's activities. That action would be wholly

inconsistent with the remainder of the evidence. The reasonable inference to be drawn from the evidence is that Mr. Letts' did not in a room of sixty or more persons, some of whom he knew to be union supporters, refer to the union's application for certification and/or the upcoming hearing date, and/or for good measure deliberately point to the green sheets posted on the bulletin board in case any employee had missed the point. In light of all the evidence we prefer the evidence of Mr. Randy Wilson, the employee who asked the question about the plant expansion, about what was said and done during that meeting.

44. Although we find that Mr. Letts did not, at the June 22nd meeting act in a manner which contravened the Act, we do find that the meeting is one of the circumstances which we must consider when assessing the overall environment surrounding the petition. Although not in any way determinative of the issue, the meeting is one of the factors or circumstances to consider in determining whether the petition is a voluntary expression of the employees' true wishes. In this regard we concur with the decisions of the Board in *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551 and *Mitten Industries Galt Ltd.*, [1975] OLRB Rep. March 155 where the Board referred to employer meetings which preceded the circulation of a petition. Although the Board found that the respondent employers had not violated the Act by their conduct at the meetings the meetings were nevertheless considered when the voluntariness of the petition was addressed. In such circumstances the issue is not whether the employer breached the Act but "... whether the evidence contradicting union membership can be relied on by the Board". As noted in *Mitten Industries Galt Ltd., supra*" it is quite possible that the employer's speech, although not unlawful, may still cast doubt on the reliability of the employee petition".

45. Next, we turn to the conversation which Mr. Letts had with Ren 2i Sauve and Gaston Michaud. Mr. Sauve's evidence was somewhat disjointed and vague in details as Mr. Sauve readily admitted that he could not remember with any degree of precision or clarity exactly what was said by either Mr. Letts or himself on any specific occasion. Mr. Sauve stated that he had two lengthy conversations with Mr. Letts during the union organizing campaign and that his evidence before the Board was a combination of those conversations. As he testified it became clear that Mr. Sauve was giving an overview and synopsis of the conversation and could not recall with any degree of specificity exactly what was said and in what context. This is not to say that Mr. Sauve was not telling the truth. Indeed, Mr. Sauve struck us as an open and honest witness. For that reason, we have examined the thrust of his evidence. In our view, the thrust of his evidence is not materially different from Mr. Letts' recollection of the conversation. The differences which do exist do not support a finding that the respondent violated the Act.

46. The conversation took place on the plant floor and was initiated by Mr. Sauve. Mr. Letts and Mr. Sauve have known each other for more than ten years, are friends, and frequently discuss matters of mutual concern on the plant floor. It is clear that Mr. Sauve told Mr. Letts that after much thought he had signed a union card and was in favour of union representation. Mr. Sauve volunteered this information to Mr. Letts and did not feel threatened in doing so. Mr. Sauve testified that Mr. Letts stated that "he didn't think the company could survive with the union" as alleged in the complaint. Mr. Letts denied making any such statement. Having regard to the totality of Mr. Sauve's evidence, in light of Mr. Letts' denial, we are not satisfied that Mr. Letts linked the continued survival of CMS to non-unionization as suggested by Mr. Sauve. At best there was a discussion about their mutual concerns about the possible impacts of unionization.

47. It is clear that the two men discussed the pros and cons of unionization and their concern about the effect that unionization would have upon the company. Our review of the evidence of both men however indicates that Mr. Letts' comments fall within the permissible parameters of an employer's freedom to express his views provided for in section 64 and were not coercive, inti-

midating or threatening. Neither did Mr. Letts make any promise or use undue influence during the conversation. During the course of the conversation, it is entirely likely that reference was made to the competitive nature of the business and the possible effect of unionization upon customers as asserted by Mr. Sauve. That in fact is not disputed by Mr. Letts. Having regard to the totality of the evidence however, we find that Mr. Letts did no more than express his view point which was basically that he did not know what effect unionization would have.

48. Similarly, we find that the evidence in support of the allegation in the complaint that Mr. Letts advised Mr. Michaud of "negative consequences of a successful organizing campaign" does not support an unfair labour practice finding. Again, we note the uncontradicted evidence that Mr. Michaud advised Mr. Letts at the commencement of the conversation that he was a union supporter who had been involved in the union organizing campaign. Like Mr. Sauve, Mr. Michaud felt no compunction about disclosing that information. We also note Mr. Michaud's own evidence that during the conversation, in response to one of his questions, Mr. Letts specifically told him people who signed the card would not get fired because "it's a guy's own choice". On the basis of the evidence before us, we conclude that Mr. Letts, at Mr. Michaud's own request, spoke of the effect which unionization might have. He did so because of Mr. Michaud's expressed concern relating to "rumours" going around the shop. In fact, Mr. Michaud met specifically with Mr. Letts (having previously discussed the desirability of doing so with Wayne Fraser, the Steelworker staff representative in charge of this campaign) to discuss his concerns. In that context, Mr. Letts did indicate that he was also concerned about the effect which unionization might have upon the business of CMS because he did not know how customers would react or how the company's competitiveness might otherwise be affected. In so doing however, Mr. Letts did not step over the line of his freedom to express his views and did not use coercion, intimidation, threats, promises or undue influence.

49. The last event in support of the unfair labour practice complaint with which we will deal is the "meeting" which Rick Poitras had with the other employees in his department on June 19, 1989. As indicated, Mr. Poitras is not a managerial employee within the meaning of section 1(3)(b) of the Act. He is a lead hand. The uncontradicted evidence is that management at CMS was not aware of the discussion which Mr. Poitras had with certain employees on the shop floor. There is no suggestion that Mr. Poitras was acting at the suggestion or behest of management. From the totality of the evidence, we conclude that during this brief shop floor discussion Mr. Poitras was expressing his own personal view points. A reasonable employee would have considered his comments in that vein. We therefore find that the discussions which Mr. Poitras had with the employees do not constitute a violation of the Act by CMS.

50. We then turn to the voluntariness of the petition. Counsel for the Steelworkers asserted that we ought not to rely upon the petition because it was not supported by credible *viva voce* evidence. Counsel pointed to the direct contradictory evidence of Mr. Liscum and Mr. McQuillan. Counsel argued that we should accept and prefer the evidence of Mr. McQuillan as supported and corroborated by Mr. Bernier and reject the evidence of Messrs. Liscum and Hansellman. Counsel submitted that if we find that Mr. McQuillan signed the petition in the company parking lot in the circumstances to which Mr. Mr. McQuillan testified and not at Fielding Memorial Park as asserted by the objecting employees, then the remainder of the evidence tendered by Messrs. Liscum and Hansellman regarding the origination and circulation of the petition is suspect and could not be relied upon. Counsel argued that this in and of itself was sufficient to dispose of the petition.

51. In the alternative, counsel points to a number of factors which should cause us to conclude that we could not rely upon the petition as a free and voluntary expression of the true wishes of the employees. These factors include *inter alia* Mr. Letts' comments during the June 22nd meet-

ing, Mr. Poitras' comments during the brief shop floor discussion he had with employees, the involvement of lead hands in the origination and circulation of the petition, the threat made by Mr. Poulin to Mr. Bergeron, the fact that both Mr. Hansellman and Mr. Liscum at some time during the circulation of the petition each took time off from work, and the "gap" in the evidence concerning the origination of the petition because Mr. Poulin was not called.

52. The objecting employees asserted the petition was voluntary and pointed to the total lack of evidence of any involvement by management in either the origination or circulation of the petition. Counsel argued that the fact that Mr. Poulin did not testify was not critical because it was submitted all Mr. Poulin did was to pick up the blank petition from the lawyer's office and give it to Mr. Liscum.

53. The Board embarks upon its inquiry regarding the origination and circulation of the petition with care. The rationale for such care has been set out in various decisions. For example, in *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813, it was noted:

> There is a natural suspicion which attaches to a statement of desire following closely upon a union organizing campaign. The Board must assure itself that the "change of heart" indicated by the employees who sign the petition in opposition to the union after having indicated support for that same union is a free choice unimpeded by overt or subtle pressures.

54. Along similar lines, in *Trim Trends Canada Limited*, [1986] OLRB Rep. Mar. 364 the Board states at page 365:

> 4. Before it will exercise its discretion to direct the taking of a representation vote on the basis of a statement of desire, however, the Board must be satisfied that when union members signed a statement indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer and result in reprisals.

55. The burden of proof in circumstances such as this lies with the party which asserts the voluntariness of the petition. The Board has set out its reasoning in this regard in *Radio Shack*, [1978] OLRB Rep. Nov. 1043 at paragraph 24. In determining whether the petition is a voluntary expression of the wishes of the employees, the Board reviews the overall environment of the workplace. The Board faced with determining whether the petition is a voluntary expression of the wishes of the employees looks to the surrounding facts and circumstances in each case to determine, on an objective basis, whether an employee might reasonably perceive the involvement of management in the petition or might reasonably perceive that whether or not the employee signs the petition is likely to come to the attention of the employer. The test to be applied in such determination is not a subjective one.

56. The facts and circumstances of this case do not persuade us that the petition is a voluntary expression of the wishes of the employees. There are a number of factors which, when taken together, have caused us to conclude that the objecting employees have not met the burden of proof. Although it may be that none of these factors standing alone would be sufficient to cast doubt upon the voluntariness of the petition, their cumulative effect has caused us to doubt the reliability of the document as a voluntary expression of the employees's wishes. We have already referred to the meeting of June 22nd in paragraphs 33 to 44. The issue here is the reliability of the petition, not the propriety of the respondents' conduct.

57. The applicant refers to the position of Messrs. Liscum and Poulin and argues that their position as lead hands brings the voluntariness of the petition into question. We agree that the position which the originators and/or circulators of the petition hold within the workplace and how

these persons are viewed or perceived by their fellow employees is a relevant consideration. How that consideration affects the voluntariness is a question of fact based upon the duties and responsibilities of the lead hands and how they are perceived by the employee population. The mere fact that a petition is circulated by a lead hand does not render it involuntary *per se*. Conversely, the fact that the lead hand circulator is a member of the bargaining unit will not automatically lead to a finding of voluntariness if, viewed objectively, the perception of employees is such that the lead hand exercises a degree of authority sufficient to affect the employment status or relations of the employees of the bargaining unit. (See for example, *I. M. Patushak*, [1980] OLRB Rep. July 979; *Quality Circus*, [1979] OLRB Rep. Aug. 794; *Trent Electric*, [1976] OLRB Rep. April 163; *Dad's Cookies*, [1976] OLRB Rep. Sept. 545; *General Crane*, [1974] OLRB Rep. Oct. 662; *Apex*; [1983] OLRB Rep. Jan. 1; *Morgan Adhesives of Canada Limited*, *supra*; *Leamington Vegetable Growers Co-operative Limited*, [1974] OLRB Rep. June 402; *Thornton Sand & Gravel*, [1987] OLRB Rep. Oct. 1331; *Chatham Concrete Forming*, [1986] OLRB Rep. April 426, *Westgate Nursing Home Inc.*, [1981] OLRB Rep. June 810 where petitions were found not to be voluntary because of the position of the circulator of the petition. See *F. W. Woolworth Co. Ltd.*, [1982] OLRB Rep. May 797, *Standard Brands Ltd.*, [1972] OLRB Rep. June 654, *Cat Fish Calhoun Inc.*, *supra*, *Matshishita Industrial Canada Ltd.*, [1981] OLRB Rep. Nov. 1605 for the contrary conclusion).

58. In our decision dated October 16, 1989, we found that Messrs. Poulin and Liscum did not exercise managerial functions within the meaning of section 1(3)(b) of the Act and were properly included in the bargaining unit. A review of their duties and responsibilities does not suggest that either man is perceived as possessing sufficient authority to affect the employment status of employees in the bargaining unit. The lead hands are not and cannot be perceived as "bosses". Rather, the lead hands are, and can properly be perceived, as being a communicative "link" or "conduit" to and from management. To this extent they do stand apart from the other members of the bargaining unit. Although not managerial, the group of lead hands do differ from other employees in the bargaining unit. In the present case, the fact that a majority of this group of lead hands actively participated in the origination and circulation of the petition (two lead hands jointly thought of the petition and originated it, one lead hand witnessed all the signatures, the other lead hand promoted the petition and directed persons where to go to sign the petition), or otherwise expressed their opposition to the union (as in the case of Mr. Poitras and his shop floor meeting with employees in his department) is a factor to be considered by the Board.

59. Another factor referred by counsel for the Steelworkers and considered by us is that both Mr. Liscum and Mr. Hansellman did, or at the very least employees would perceive that they had been, absent from work for purposes relating to the petition in opposition to the trade union. (In this regard see for example, *Irwin Toy Limited*, [1971] OLRB Rep. Feb. 52, *Saga Investments Limited*, [1970] OLRB Rep. July 452, *G. Smith Produce Co.*, [1974] OLRB Rep. June 402, *N. J. Spivak*, [1976] OLRB Rep. April 158).

60. Another factor considered was the involvement of Mr. Poulin in the petition and his failure to testify. It is clear that Mr. Poulin performed a major role in both the origination and circulation of the petition. The objecting employees argued that Mr. Poulin merely "picked up the petition from [Mr. Valin's] office." We do not agree. The evidence discloses that the idea of circulating a petition originated jointly with Mr. Liscum and Mr. Poulin. Mr. Liscum took the initiative in calling Mr. Poulin to ascertain his views on the matter but it was Mr. Poulin who first mentioned a petition of concerned employees. The "origination" of the petition was a joint decision which resulted from the telephone conversation between Mr. Poulin and Mr. Liscum. The lack of evidence from Mr. Poulin about the origination of the idea of a petition, although not fatal is certainly a factor to consider. (See *Phillips Electronics Industries Ltd.*, [1975] OLRB Rep. Nov. 758, *Remmington Rand Ltd.*, [1963] OLRB Rep. March 535, *Trench Electric Ltd.*, [1976] OLRB Rep.

March 163, *James M. D. Watt*, [1965] OLRB Rep. Oct. 472, *Canada-Dry Bottling Co. Ltd.*, [1987] OLRB Rep. March 337.

61. Similarly, it is clear that Mr. Poulin did much of the "leg work" relating to this petition. Not only was he the only person present when the petition was drafted, the evidence clearly indicates that he solicited employees with a view to obtaining signatures to the petition, he directed and instructed employees where and when they could sign the petition, and he collected monies required to meet the expenses of the objecting employees. His role in these aspects of the circulation of the petition is particularly significant in light of Mr. Liscum's testimony that at the time employees signed the petition there was very little discussion. From the totality of the evidence, we must conclude that much of the ground work was done by Mr. Poulin before employees signed the petition in Mr. Liscum's possession.

62. Mr. Poulin's failure to testify is significant because of the uncontradicted and unchallenged evidence of Mr. Bergeron. Implicit in the conversation between Mr. Bergeron and Mr. Poulin is a threat to job security in both Mr. Poulin's reference to union organizers losing their jobs and his response that he sure hoped he could save Mr. Bergeron's job if Mr. Bergeron signed the petition. The effect of those types of statements must be assessed in light of Mr. Poulin's status as a lead hand. Although not managerial, it cannot be said that Mr. Poulin's comments were simply one employee's view point expressed to another employee. Mr. Poulin made the statements in order to solicit support for the petition. The statements would have greater force because Mr. Poulin was not simply another employee, but a lead hand who, although not managerial did stand apart from the other employees in the bargaining unit and provides a link to and from management. (See *Westgate Nursing Home Inc.*, *supra* and *Dad's Cookies*, *supra*). Therefore, not only does the Board not have any direct evidence from Mr. Poulin about his active involvement and participation both in the origination and circulation of the petition, the evidence we do have indicates that Mr. Poulin's conduct while soliciting support for the petition was improper and inappropriate. In the circumstances, his failure to testify raise questions which detract from the weight to be given to the petition as an expression of the voluntary wishes of the signatories.

63. In all of the circumstances, the Board finds that the petition cannot be viewed as a reliable indicator of the wishes of the persons who signed it. It does not cast sufficient doubt upon the membership filed in support of the application so that the Board should seek the confirmatory evidence of a representation vote. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 28, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

64. A certificate will issue to the applicant.

65. The complaint in Board File 0832-89-U is dismissed.

2665-89-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **D.J. Venasse Construction Limited,** Respondent

Certification - Construction Industry - Practice and Procedure - Union making sixth certification application for substantially the same group of employees in two months - Respondent employer requesting that application be dismissed and bar imposed - Board disagreeing with argument that the mere frequency of applications warrants dismissal and a bar - Repeated applications may be vexatious or an abuse of process but these concerns not raised here - Motion dismissed - Certification application to proceed

BEFORE: *Louisa M. Davie,* Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine.*

APPEARANCES: *Bernard Fishbein, Jules Bloch* and *K. P. Ryan* for the applicant; *Jim Hassell, Michael Venasse* and *Anne Murphy* for the respondent.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND C. A. BALLENTINE BOARD MEMBER: April 17, 1990

1. The name of the respondent is amended to read: "D.J. Venasse Construction Limited".

2. This matter came on for hearing before us on March 26, 1990. At the commencement of the hearing into this application for certification, counsel for the respondent made a preliminary motion requesting that this application be dismissed and that a bar be imposed. In so doing, counsel stated that he relied upon section 103(2)(i) of the *Labour Relations Act* ("the Act") and section 23(1) of the Statutory Power of Procedure Act ("the SPPA"). The motion was opposed.

3. Counsel for the respondent submitted this was the sixth application for certification filed by this applicant in respect of substantially the same group of employees in little more than two months. The first application was filed on November 23, 1989. The current application was filed on February 1, 1990. Counsel argued that the frequency of the applications warranted the imposition of a bar and relied principally upon *St. Joseph's Hospital of Sarnia, Ontario*, [1984] OLRB Rep. Sept. 1264 and *J. W. Crooks Company*, [1972] OLRB Rep. February 126.

4. In opposing the motion, counsel for the applicant asserted that generally, an application for certification is not entertained and/or a bar upon subsequent applications is imposed only where a representation vote has been held and the applicant has failed to obtain the necessary majority to be entitled to certification, or where an applicant has withdrawn an earlier application because it feared defeat in a representation vote which had been directed. Counsel acknowledged that in "special and extreme" circumstances which involved an abuse of the Board's process the Board has refused to entertain an application and imposed a bar but argued that those instances were rare and not applicable to the case before us. He relied upon *inter alia*, *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091, *Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441, *Repac Construction & Materials Limited*, [1978] OLRB Rep. Jan. 91, *Sonora Cosmetics Inc.*, [1982] OLRB Rep. June 954, *Mor-Alice Construction Limited*, [1977] OLRB Rep. Oct. 668, *Colautti Construction Ltd.*, [1985] OLRB Rep. May 643, *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531.

5. The history which precedes its application may be summarized as follows: On November 23, 1989, the applicant filed an application for certification relating to all construction labourers in the employ of the respondent in the industrial, commercial and institutional (ICI) sector of the construction industry in the Province of Ontario and all construction labourers in all other sectors

in Ontario in Labour Relations Board Area 16 (a standard ICI and Board Area 16 Bargaining unit). By telegram sent on November 27, 1989, and before the application had been sent to the respondent, the applicant sought leave of the Board to withdraw that application. By decision dated November 30, 1989 leave to withdraw was granted by the Board. By letter dated December 5, 1989, both parties were notified of this decision. We note that the respondents did not file a reply or a list of employees in response to this application (presumably because it was never notified of the application).

6. In the meantime, on December 1, 1989, the applicant had filed two further applications for certification (Board Files 2180-89-R and 2181-89-R). It is somewhat of a misnomer to refer to two applications because, in fact, one of the applications related to a standard construction labourers ICI and Board Area 16 bargaining unit, while the other related to construction labourers in Board Area 16 only. These two applications are therefore "overlapping" applications covering essentially the same employees. The applicant was unable to explain why it found it necessary to file two applications.

7. In those two applications, a terminal date of December 14, 1989 was fixed and notice of that was sent to the applicant. The respondent posted the notices that it was required to post and filed two replies and lists of employees prior to the terminal date. Neither the replies nor the lists of employees were forwarded to the applicant at any time because, by telegram sent on December 15, 1989, the applicant sought leave of the Board to withdraw the applications. In its submissions before the Board, the applicant stated that these applications were withdrawn because the applicant had "forgotten" to file some of the membership evidence. By decision of the Board dated December 19, 1989, leave to withdraw was granted. By letter dated December 28, 1989, the parties were notified of this decision.

8. In the interim however, the applicant had again filed two further applications for certification (Board Files 2289-89-R and 2290-89-R) on December 15, 1989, (the same day on which it had requested leave to withdraw the two earlier applications). Again, the applicant filed "overlapping" applications. One related to a standard ICI and Board Area 16 bargaining unit, while the other related to Board Area 16 only. January 4, 1990 was fixed as a terminal date in each of these applications. The respondent posted the notices and filed the replies and the lists of employees prior to the terminal date. In this case, the respondent's reply, but not the list of employees, was forwarded to the applicant. An unfair labour practice complaint and a request to be certified pursuant to section 8 of the Act was also filed by the applicant.

9. By letter to the Board dated January 15, 1990, counsel for the respondent requested that the Board exercise its discretion under section 103(2)(i) and refuse to entertain these two applications for certification (Board Files 2289-89-R and 2290-89-R) and bar the applicant from making further applications until June 15, 1990. That request was opposed in a letter to the Board dated January 19, 1990 by counsel for the applicant.

10. A hearing in Board Files 2289-89-R and 2290-89-R was scheduled and held before a panel of the Board (differently constituted) on February 1, 1990. At the conclusion of that hearing the Board orally ruled to dismiss the applications but did not impose a bar.

11. At the hearing before us, the reasons for that oral ruling had not been issued by that panel of the Board. Although the parties were unaware of the reasons, there was no dispute that Board Files 2289-89-R and 2290-89-R had been dismissed on February 1, 1990. Therefore section 103(3) of the Act is not applicable to the issues before us as there was no pending application before the Board when the application currently before us was filed.

12. Since the preliminary motion was argued before us, the written decision and reasons of the Board dismissing Board Files 2289-89-R and 2290-89-R were issued in a decision dated March 26, 1990. We have had the benefit of reading that decision. The decision is brief and states:

> 2. This is the latest in a series of applications in which the union seeks to represent various groupings of the respondent's employees. The pattern of those applications need not be set out here. It's [sic] suffices to say that there have been a number of them, and in each case the union sought and was granted leave to withdraw. In some instances, new filings were made before a final disposition of the earlier proceedings.
>
> 3. The employer characterizes the present proceedings as repetitive and vexatious, and urges that they be dismissed pursuant to sections 103(1)(i) or 103(1)(3) [sic] of the *Labour Relations Act*. The union expressly agrees that we have jurisdiction pursuant to section 103 to dismiss the current applications, but asserts that the previous applications have not resulted in a particularly onerous burden upon the employer, and further that it is important to give weight to the statutory right to union representation - particularly in the construction industry where employment relationships are fluid.
>
> 4. Having considered the representations and agreement of the parties concerning the facts and the Board's jurisdiction, we are unanimously of the view that these applications should not be entertained and should therefore be dismissed.

13. It is not entirely clear from the decision whether the Board in fact relied upon section 103(3) or section 103(2)(i) in refusing to entertain the applications. Certainly, unlike the case before us, the panel which dealt with Board Files 2289-89-R and 2290-89-R was dealing with "subsequent applications" made at a time when "a final decision of the [previously filed] applications [had] not been issued by the Board" (section 103(3)). The issue before us is not complicated by such factor and can be dealt with pursuant to section 103(2)(i). There is no dispute that in these circumstances we have jurisdiction pursuant to that section.

14. The respondent asserts that the frequency of the applications should cause us to dismiss the application. It is argued that the series of applications have caused confusion and upheaval amongst the employees, and have caused hardship to the employer who must respond to the applications by posting the forms, filing replies and, although not argued, attending at the hearing. Evidence was not called in support of these submissions. We also note that a statement of objection to any of the applications for certification has not been filed with the Board by any employee.

15. In the present circumstances, we are not prepared to exercise our discretion and refuse to entertain this application or bar the applicant notwithstanding the previously withdrawn applications or the dismissal of the earlier applications on February 1, 1990. We find that in all of the circumstances, the mere frequency of the applications do not warrant a dismissal and the imposition of a bar to future applications.

16. In view of all the circumstances including the fact that there has not been a meeting with a Labour Relations Officer or discussion amongst the parties in respect of the list of employees (not yet seen by the applicant), the bargaining unit or any other matter raised in the various replies (some of which were never provided to the applicant), we have concluded that the mere frequency of the applications is insufficient to dismiss this application and impose a bar. These are not "special and extreme" circumstances nor do they represent an abuse of the Board's process.

17. The Board does not condone the apparently slipshod manner in which this applicant has dealt with these applications for certification. Under the circumstances however we do not find that they constitute an abuse of the Board's process. It would be punitive for the Board to dismiss the

application and bar the applicant thereby potentially depriving employees of their right to trade union representation for a period of time.

18. There may be instances where repeated filings of applications which are ultimately not proceeded with does constitute an abuse of process, as for example by keeping the employer in a perpetual "freeze" period for a lengthy period of time. Similarly, and in the construction industry in particular, repeated applications may effectively deny another trade union an opportunity to represent employees or to have its applications for certification dealt with expeditiously. Given the nature of the construction industry and the transitory nature of employees within that industry, and in view of the importance which the "date of application" has in certification applications which relate to the construction industry (which may make the options available to the Board in section 103(3) unattractive), repeated applications may be vexatious or an abuse of process. In our view, the present circumstances, however do not raise these concerns.

19. For all of these reasons, the Board declines to exercise its discretion to dismiss this application and impose a bar. This application will proceed. The Registrar is directed to list this matter for hearing. The purpose of the hearing is to hear the evidence and representations of the parties in respect of all outstanding issues arising from this application for certification including the list and composition of the bargaining unit and the request of the applicant made in its letter dated March 12, 1990 to be certified pursuant to section 8 of the Act.

DECISION OF BOARD MEMBER W. GIBSON; April 17, 1990

1. I dissent.

2. This application for certification before us, dated February 1, 1990, is the fourth application made by this union since November 23, 1989 for the same bargaining unit (sixth application in total if you count the unnecessary twin applications made on December 1, 1989 and December 15, 1989).

3. The union came before us, and admitted, quite frankly, that they had made errors in the filing of the first and second applications, for which they apologized. Accepting this apology still leaves us with the unnecessary paperwork inflicted on both the OLRB and the employer, plus, even more importantly, the disruption to the employers operations while this application is continually being filed, withdrawn, and re-filed. Also these parties have been held in a statutory freeze since November 23, 1989.

4. This union's prior application for this same unit of employees on December 15, 1989 was dismissed by another panel of this Board, and I would have dismissed this one too, and this time imposed a six month bar. I do not see this as being punitive, but rather as the sending of a message to this union that it is not unreasonable for the OLRB to expect that a union, particularly one like the Labourers' union, well versed in the practices and policies of the OLRB, to be able to file a properly completed application for certification in less than "4 tries".

2828-88-U Rhonda Deneau, Complainant v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local #49, Respondent v. Multi-Fittings, Intervener

Damages - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union settling discharge grievance at arbitration - Complainant not adequately advised of terms of settlement requiring her to present herself to work by specified date or her grievance would be dismissed - Breach of fair representation duty - Failure to advise employee of settlement terms which cause employee to fail to comply leading to dismissal of grievance found to be arbitrary conduct - Damages for loss of opportunity - Quantum to be worked out by parties

BEFORE: *Ken Petryshen,* Vice-Chair.

APPEARANCES: *Andrew Camman* and *Rhonda Deneau* for the complainant; *Edward C. Witthames* and *Denis Brewin* for the respondent; *A. P. Tarasuk, L. Pickering* and *C. Richman* for the intervener.

DECISION OF THE BOARD; April 6, 1990

1. The name of the respondent is amended to read: "Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local #49".

2. This is a complaint under section 89 of the *Labour Relations Act* in which Ms. Deneau alleges that the Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local #49 (hereinafter referred to as "Local 49") has contravened section 68 of the Act.

3. When this matter first came on for hearing on August 19, 1989, counsel for the intervener employer, Multi-Fittings, argued that the Board did not have jurisdiction in the circumstances of this case to award a remedy that would have any impact on Multi-Fittings. Very briefly, this position was based on the following circumstances. Ms. Deneau's discharge grievance was scheduled to be arbitrated on October 9, 1987. Local 49 and Multi-Fittings settled the grievance on that day after appearing before a sole arbitrator. The parties requested the arbitrator to incorporate the terms of the settlement into an award. The arbitrator complied with this request and issued the award on November 13, 1987. Generally, Ms. Deneau alleges that the failure of Local 49 to properly communicate the terms of the settlement to her constitutes a contravention of section 68. Given the broad remedial request initially made by the complainant, Multi-Fittings took the position that the arbitration award precluded the Board from issuing any remedy that would affect it and, in asserting this position, relied on the Divisional Court decision in *Re Windsor Western Hospital Centre Inc. and Mordowanec et al*, (1987), 56 O.R. (2d) 297. Local 49 supported Multi-Fittings' position while Ms. Deneau opposed it. After entertaining submissions and after recessing to consider the matter, the Board advised the parties that it would reserve its decision on the point and would proceed to hear the merits of the complaint. After certain continuation dates were fixed on agreement of the parties, the matter was adjourned on August 19, 1989.

4. When the complaint next came on for hearing, counsel for Ms. Deneau at the outset advised the Board and the parties that Ms. Deneau was no longer seeking a remedy that would affect Multi-Fittings. More specifically, counsel indicated that Ms. Deneau no longer sought reinstatement or an arbitration of her discharge and only requested an order for damages against Local 49. With this announcement, Multi-Fittings and its counsel elected not to participate in the matter any further and left the hearing. Although the representative for Local 49 requested that the Board

still decide the issue raised by Multi-Fittings, the Board finds it unnecessary to do so in these circumstances.

5. Ms. Deneau testified in support of the complaint, as did two other employees of Multi-Fittings. Local 49 called Denis Brewin, the plant chairperson, to give evidence. Mr. Witthames, Local 49's representative at the Board hearing and the individual who represented Local 49 at the arbitration proceeding, did not testify. In determining the facts, the Board has carefully reviewed the evidence of the witnesses and the parties' submissions.

6. Ms. Deneau's employment with Multi-Fittings began in August 1985. She is thirty-five years old, married with three children, and she left school after grade 10. Ms. Deneau was employed by Multi-Fittings as a machine operator and her last day of work was November 9, 1986. Approximately 2½ weeks prior to November 9, she sustained a work-related injury to her arm which she reported to the plant nurse and doctor. Ms. Deneau attempted to continue working but was unable to work beyond November 9 due to her injury. Up until November 1986, Ms. Deneau had a good work record and was absent for only three days for medical reasons.

7. Ms. Deneau saw her family doctor as well as two specialists in order to obtain treatment for her arm. She was unhappy with the approach of the first specialist who appeared to her to be of little assistance, particularly when he suggested that she seek other employment. In early 1987, Ms. Deneau saw another specialist who recommended that she initially try therapy, then cortisone and finally surgery, if necessary. In June 1987, Ms. Deneau discovered she was pregnant and was advised to stop the treatment for her injury. At this time, she was advised by her specialist that a date would be set for surgery after she delivered her baby.

8. In February 1987, Ms. Deneau received a letter from Multi-Fittings advising her that her employment was terminated since she could no longer do the job. She filed a grievance challenging the discharge and an arbitration hearing before a sole arbitrator was scheduled for October 9, 1987. When by early September she had not yet been contacted by Local 49 about her arbitration, Ms. Deneau contacted Jack Erskine, a union representative, about the matter. This led to the setting up of a pre-arbitration meeting between Ms. Deneau and Mr. Witthames on September 26, 1987.

9. The arbitration proceeding on October 9, 1987 began with the representatives of both sides making opening statements to the arbitrator. After the opening statements and before any evidence was called, the representatives of the parties and the arbitrator left the hearing room. The representatives were engaged in settlement discussions and eventually reached a settlement in the early afternoon of October 9. During the settlement discussions, Mr. Witthames returned to discuss certain matters with Ms. Deneau. On the first such occasion, he asked her whether she was covered for medical benefits. The evidence concerning what was discussed on the second occasion is very sketchy. Ms. Deneau and Mr. Brewin have little recollection of what was said in this discussion. Mr. Alexander testified that he did not hear all of the discussion but he understood that Mr. Witthames came to ask Ms. Deneau about "some sort of agreement". Mr. Alexander testified he understood that if Ms. Deneau was unable to attend at work by a certain time only because of her work-related injury, her discharge would be arbitrated in August 1988. It is unclear from the evidence whether the second discussion occurred at a time when the settlement discussions had been completed and whether the purpose of the discussion was to determine if Ms. Deneau agreed to the terms of the settlement.

10. The parties did not execute minutes of settlement. The hearing reconvened and the parties conveyed to the arbitrator the terms of the settlement and requested that they be incorporated in an award. The arbitrator then advised the parties that she would issue an award and went over

the terms that would be included in the award. At this point, the proceedings terminated. The substance of the award issued by the arbitrator on November 13, 1987 in connection with the Deneau arbitration proceeding is as follows:

AWARD

A hearing in this matter was convened in London, Ontario on October 9, 1987. In the course of the hearing, I was advised that the parties had agreed to adjourn the matter on the following terms:

1. the Grievor agrees to present herself for work on or before July 5, 1988;

2. if the Grievor fails to present herself for work on or before July 5th, the grievance will be withdrawn;

3. if the Grievor presents herself for work before July 5th and the Company accepts her as being fit to return to work but she is again discharged before July 5th, then, if the Union so requests, the grievance will be arbitrated in accordance with the provisions set out in paragraph 6 herein;

4. if the Grievor presents herself for work on or before July 5th and the Company accepts her as being fit to return to work and she is not subsequently discharged before July 5th, the grievance will be considered to be resolved;

5. if the Grievor presents herself for work on or before July 5th and the Company refuses to allow her to return to work, then, if the Union so requests, the grievance will be arbitrated in accordance with the provisions set out in paragraph 6 herein;

6. the arbitration hearing will take place before this Arbitrator on August 2, 1988. The only issue to be determined at the arbitration hearing is whether the Grievor was fit to return to work as of July 5, 1988. If the Arbitrator finds that the Grievor was fit to return to work as of July 5th, the Grievor will be reinstated with or without compensation. If the Arbitrator finds that the Grievor was not fit to return to work as of July 5th, the grievance will be dismissed;

7. the Grievor will be entitled to have her life insurance coverage reinstated forthwith. She will be entitled to no other benefit coverage under Article 31 of the collective agreement; and

8. the Union will assume the costs of the arbitration hearing of October 9, 1987, i.e. the fees and disbursements incurred by the Arbitrator.

This agreement has the same force and effect as if it were an award of an Arbitrator.

I will remain seized of this matter until the grievance is resolved between the parties in accordance with the terms set out above.

11. In reviewing the merits of the grievance, Local 49 determined that the circumstances required it to attempt to gain time. Ms. Deneau was not fit for work by October 9, 1987 and, given that she required surgery and would not be able to have the operation for some time due to her pregnancy, it was not certain when she would be fit for work. In Local 49's view, the settlement achieved its objective of giving Ms. Deneau more time to become fit for work. Ms. Deneau does not take issue with the substance of the settlement. Her complaint is that she was not adequately advised on October 9, 1987 or subsequently about the terms of the settlement, particularly the significance of the July 5 date, and her obligations under the settlement. Ms. Deneau claims that she was never advised that she was required to present herself for work on or before July 5, 1988 and

that her failure to do so would result in her grievance being withdrawn. Ms. Deneau did not report for work on or before July 5, 1988, with the result that her grievance was withdrawn.

12. Ms. Deneau testified that Mr. Witthames explained the settlement to her in the presence of Mr. Alexander and Mr. Brewin for approximately five to ten minutes as they were on their way out to the parking lot after the arbitration proceeding had concluded. She stated that what she understood from this explanation was that she had to return to work by July 5, 1988 and that if she did not return to work by that time because of her work-related injury, there would be an arbitration held on August 2, 1988 to deal with her discharge grievance. Ms. Deneau did not testify as to what Mr. Witthames precisely said at this time. Although her recollection was not the best concerning what occurred at the arbitration proceeding, she strongly asserted that she was not told that she had to present herself at work on or before July 5 and that her failure to do so would lead to the withdrawal of her grievance. Ms. Deneau testified that if the arbitrator reconvened the hearing, she was not present. She stated that after the arbitrator left with the representatives of the parties just after the hearing commenced, she never saw the arbitrator again and was not present when the arbitrator disclosed to the parties what the award would contain. Ms. Deneau testified that she never went back down to the hearing room after she had left it. Ms. Deneau stated that she had lunch on October 9 with Mr. Alexander and Mr. Brewin after the arbitration hearing and, although the settlement terms were discussed, nothing was said which altered her understanding of what Mr. Witthames told her. Ms. Deneau was not provided with a copy of the arbitration award until after July 5, 1988.

13. As noted earlier, Ms. Deneau's specialist would not fix a date for her surgery until after her child was born. Shortly after the birth on December 9, 1987, she contacted her specialist and June 1988 was fixed for her surgery. Ms. Deneau stated that she had her name placed on a cancellation list in order to ensure that the operation would be done earlier if possible. Ms. Deneau advised Mr. Brewin of the date of her surgery and had some other conversations with him directly and other contacts via Ms. Coody prior to July 5, 1988. She testified that she advised Mr. Brewin that she would be unable to return to work by July 5, 1988 and that he responded by saying that she did not have to worry since she had the August 2 arbitration date. She stated that at no time did Mr. Brewin advise her that she must present herself at Multi-Fittings on or before July 5. Near the end of July 1988, Ms. Deneau contacted Mr. Erskine and asked if Mr. Witthames would be contacting her soon in order to prepare for the August 2nd arbitration. As a result of this contact she was eventually provided with a copy of the arbitration award and she testified that the first time she became aware of the significance of the July 5, 1988 date was when she read the award. Ms. Deneau was shown a copy of the award while testifying and stated that she could clearly understand from reading the first and second points that the settlement required her to present herself for work no later than July 5. She stated that she would have reported for work before July 5 if she had known of this requirement. She also stated that she would never agree to the terms of the settlement relating to the July 5 date given that she was unaware of when the surgery would be performed. Ms. Deneau was not fit for work until the end of October 1988.

14. As noted earlier, Mr. Alexander is a union steward and he was present at the arbitration hearing as an observer. He was served a summons by the complainant and it was quite clear that he was not comfortable with the role of testifying for the complainant against Local 49. Mr. Alexander stated that he did not understand that the settlement required Ms. Deneau to present herself at work by July 5. Mr. Alexander also indicated that he and Ms. Deneau were not present if and when the arbitrator reconvened the hearing.

15. As plant chairperson, Mr. Brewin is involved in processing grievances and he attends arbitration hearings. Mr. Brewin stated that he would handle a grievance during the initial stages

and then the matter would be "out of his hands" once it was referred to arbitration. Mr. Brewin acknowledged that he would receive a copy of an arbitration award but that grievors usually do not. He indicated in his evidence that Ms. Deneau did attend when the arbitrator reconvened the hearing and disclosed what would be set out in the award. Although present at the arbitration, Mr. Brewin was not directly involved in the settlement discussions. His understanding of what was agreed to by the parties is based on what the arbitrator and Mr. Witthames said. Mr. Brewin stated that he understood that the settlement required Ms. Deneau to return to work or to attempt to return to work by July 5. Mr. Brewin did have some conversations with Ms. Deneau subsequent to October 9, 1987 but he does not recall her telling him the precise date of her surgery. In his conversations with Ms. Deneau, Mr. Brewin did not specifically tell her to report for work by July 5 since he thought she understood this. Mr. Brewin agreed in cross-examination that the settlement was risky given that the surgery date was unknown. He also agreed that it was unreasonable to believe that Ms. Deneau would be fit to report to work on July 5 if her surgery was in June.

16. Section 68 of the *Labour Relations Act* provides as follows:

> 68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

17. Counsel for Ms. Deneau argued that Local 49 acted arbitrarily in representing Ms. Deneau with respect to her discharge from Multi-Fittings. As noted earlier, the complainant does not base her attack on the substantive features of the settlement. However, counsel argues that, irrespective of how good a settlement is, a trade union fails in its duty to fairly represent an employee when it does not communicate or poorly communicates important aspects of a settlement. In this instance, it is argued that Local 49 did not properly advise Ms. Deneau of the significance of the July 5 date with the result that her grievance was withdrawn. Such a failure in circumstances such as these, it is argued, constitutes a breach of section 68 of the Act which entitles Ms. Deneau to damages for loss of an opportunity. Local 49's submissions were brief and, in essence, were to the effect that it had done all it could for Ms. Deneau.

18. Local 49 was involved in this instance in representing an employee discharged by her employer. The Board has often noted that a trade union's conduct will be closely scrutinized by the Board where it is alleged that it has contravened its fair representation duty towards a discharged employee. Although the jurisprudence concerning the content of the duty of fair representation is extensive, the Board finds it unnecessary to refer to that jurisprudence in addressing the alleged contravention in this case. We agree with counsel for the complainant that the failure of a trade union to advise an employee of settlement terms which in turn causes the employee to fail to comply with the settlement so as to lead to the withdrawal of a discharge grievance can constitute arbitrary conduct within the meaning of section 68.

19. On the evidence before it, the Board accepts counsel's assertion that Ms. Deneau was determined to regain her employment with Multi-Fittings and that she would take any reasonable step to ensure that her objective was met. She had a good record with the company, liked her job and she undoubtedly felt that her discharge as a result of a work-related injury was unfair. The Board is satisfied that Ms. Deneau did not understand the significance of those terms of the settlement relating to the July 5 date. In particular, she did not understand that the settlement of October 9, 1987 required her to present herself for work by July 5, 1988. We accept her evidence to the effect that if she had been aware of such a requirement she would have attempted to comply with it. Whether her misunderstanding of the settlement can be attributed to Local 49 is a more difficult question. The parties did not settle Ms. Deneau's grievance by executing minutes of settlement

signed by Ms. Deneau. Ms. Deneau did not receive a copy of the arbitrator's award from Local 49. In other words, Ms. Deneau was never presented with the written terms of the settlement prior to July 5, 1988. Although there is conflicting evidence on the point, the Board is satisfied that Ms. Deneau was not present when the arbitrator reconvened the hearing and reviewed the terms of the settlement. The Board believes Mr. Brewin when he stated that the arbitrator reconvened the hearing, but it does not prefer his recollection to that of Ms. Deneau and Mr. Alexander concerning the matter of whether Ms. Deneau was present at the relevant time. The Board is left to determine what Mr. Witthames said to Ms. Deneau. The clarity of the evidence with respect to this issue left a lot to be desired. Mr. Brewin was the only witness called by Local 49 to give evidence. But Mr. Brewin was not the person who was responsible for representing Ms. Deneau at the arbitration hearing. He did not participate in the settlement discussions with Multi-Fittings and it appears he was present at the arbitration hearing simply as an observer. His evidence concerning his understanding of the settlement terms, particularly the significance of the July 5 date, is not entirely consistent with the settlement terms. Given the nature of the evidence called by the complainant, the evidentiary onus shifted to the respondent. For the reasons stated above, Mr. Brewin's evidence did not satisfy Local 49's evidentiary onus. Since Mr. Witthames did not testify, the Board does not have the benefit of his version of what he said to Ms. Deneau about the settlement of October 9, 1987. It may be the case that Mr. Witthames advised Ms. Deneau of all the settlement terms in such a way that a reasonable employee would be expected to understand them. However, the Board cannot reach such a conclusion in the absence of evidence from Mr. Witthames. In the circumstances of this case, the Board can only conclude that Local 49 has not satisfied its evidentiary onus. The Board is satisfied that Local 49 failed to properly communicate the terms of the October 9, 1987 settlement to Ms. Deneau and that such conduct constitutes arbitrary conduct within the meaning of section 68 of the Act.

20. Subsequent to October 9, 1987, Ms. Deneau viewed Mr. Brewin as the Local 49 official to whom she should report any new developments. In their conversations which occurred between January and July, 1987, Mr. Brewin contributed to Ms. Deneau's misunderstanding of the settlement terms even though he had a copy of the arbitration award. By telling Ms. Deneau not to worry about the surgery date since there was the August 2 arbitration date, Mr. Brewin contributed to her misunderstanding of the significance of the July 5, 1988 date.

21. Counsel for Ms. Deneau argues that Ms. Deneau is entitled to damages for loss of opportunity. The Board has recognized that damages can be awarded for the loss of an opportunity in appropriate circumstances (see *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401). In determining whether such damages are appropriate in a particular case, the Board must determine whether there has been a loss of an opportunity as a result of the contravention of the Act. Counsel for Ms. Deneau argued that the respondent's contravention of section 68 resulted in Ms. Deneau losing the opportunity to have her discharge grievance arbitrated and the opportunity to attempt to become fit for work before July 5, 1988.

22. The above submissions must be considered in the context of the terms of the October 9, 1987 settlement, which have not been challenged, as well as Ms. Deneau's physical fitness during the relevant period. In effect, the settlement required that Ms. Deneau must be fit for work no later than July 5, 1988. It provided that the only issue at arbitration would be whether Ms. Deneau was fit to return to work as of July 5, 1988. The settlement specifically provided that the grievance would be dismissed if the arbitrator found that Ms. Deneau was not fit to return to work on or before July 5, 1988. Ms. Deneau was not fit to return to her job at Multi-Fittings until the end of October 1988. In these circumstances, the Board cannot conclude that, standing alone, there is any monetary value flowing to Ms. Deneau as a result of her losing the opportunity to have her discharge arbitrated. What she lost in this respect is of no value since what she lost was merely the

opportunity to lose at arbitration. The dismissal of the grievance by the arbitrator was highly likely given Ms. Deneau's physical condition as of July 5, 1988 and the narrow issue to be arbitrated.

23. Did Ms. Deneau lose the opportunity to attempt to become fit for work by July 5, 1988 as a result of Local 49's contravention of section 68 of the Act? Since Ms. Deneau was unaware of the significance of the July 5 date on October 9, 1987, the Board is satisfied that she did lose the opportunity to attempt to become fit for work by July 5, 1988. The more significant question is whether the loss of this opportunity is of any value to her. It appears clear that without the surgery Ms. Deneau would have been unable to return to work at Multi-Fittings. The Board can only speculate as to whether Ms. Deneau could have done anything more to obtain an earlier surgery date. The parties agreed that the Board would remain seized concerning the quantum of damages.

24. Accordingly, this complaint is allowed. The parties will have the opportunity to resolve between themselves the quantum of damages, if any, owing to Ms. Deneau. The Board hereby appoints a Labour Relations Officer to assist the parties in this endeavour. If the parties are unable to settle the quantum of damages, if any, owing to Ms. Deneau, the Board will schedule a hearing to deal with the issue upon request.

2732-89-M Doreen Liedeman, Applicant v. Canadian Union of Public Employees, Respondent Trade Union v. Vaughan Public Libraries, Respondent Employer

Practice and Procedure - Religious Exemption - Timeliness - Application for exemption from union dues - No collective agreement in force yet between trade union and employer - Board having no jurisdiction - Application premature - Board not willing to give hypothetical response to possible future circumstances

BEFORE: *S. A. Tacon,* Vice-Chair, and Board Members *M. Rozenberg* and *E. G. Theobald.*

APPEARANCES: *Doreen Liedeman* and *Mrs. E. Rubino* for the applicant; *Kent Mitchell* and *Carol Ball* for the respondent trade union; no one appearing for the respondent employer.

DECISION OF THE BOARD; April 24, 1990

1. This is an application pursuant to section 47 of the *Labour Relations Act.* It was not disputed that the respondent trade union was certified by the Board in a decision dated December 22, 1989 and, as yet, there was no collective agreement in force between the respondent trade union and the employer, Vaughan Public Libraries.

2. The Board gave the following oral ruling at the hearing:

> The Board has considered the submissions of the parties and finds that the application is premature.
>
> The Board derives its jurisdiction from the *Labour Relations Act* and its authority is circumscribed by that Act. Section 47(1) states, in part, that the "Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee". Section 47(2)

continues, in part, that "subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement". This statutory phrasing requires that there be a collective agreement in place containing the aforementioned clause before the Board has jurisdiction. The Board further notes that the application form itself expressly reiterates that pre-condition.

This is not a mere technicality as the applicant suggests. The Board, as stated, can only act where its governing statute gives it the requisite authority. Further, for sound labour relations policy reasons, the Board has consistently refused to give "hypothetical" or "premature" responses to possible future circumstances.

The Board, thus, dismisses the application at this stage. This dismissal is without prejudice to the applicant's right to refile an application under section 47 when and if a collective agreement is entered into between the employer and the trade union which contains a provision of the sort referred to in section 47.

3063-89-U; 3064-89-U Council of Printing Industries of Canada on behalf of **Photo Engravers & Electrotypers Limited,** Applicant v. Graphic Communications International Union Local 500M (Roto Gravure) and those persons listed in Schedule "1" to the application, Respondents; Council of Printing Industries of Canada on behalf of Photo Engravers & Electrotypers Limited, Applicant v. Graphic Communications International Union Local 500M (Lithographers) and those persons listed in Schedule "1" to the application, Respondents

Collective Agreement - Ratification and Strike Vote - Strike - Union taking employer's proposals for a collective agreement back to a membership meeting - Two units voting in favour of proposals - Union officers deciding proposals not acceptable - Members not crossing picket line of third unit -Whether collective agreement in force - No memorandum of settlement signed at last negotiating session - Votes conducted by union not ratification votes - No collective agreement based on principles of contract law - Board finding no collective agreement in place - Applications for directions concerning illegal strikes dismissed

BEFORE: *Robert D. Howe,* Vice-Chair.

APPEARANCES: Colin Morley, Jim Robinson and *Franklyn R. Smith* for the applicant; *Harold F. Caley, Jim Nyman* and *Frank O'Reilly* for the respondent trade union; no one appeared for the other respondents.

DECISION OF THE BOARD; April 3, 1990

1. These two applications for directions under section 92 of the *Labour Relations Act* were filed with the Board on March 12, 1990 by the Council of Printing Industries of Canada (the

"Council") on behalf of Photo Engravers & Electrotypers Limited (the "Company"). The time for the filing of replies and for the service of notices of hearing was abridged in respect of each of the applications by decision of another Vice-Chair of the Board, and they were scheduled for hearing on March 14, 1990 commencing at 1:30 p.m. and continuing thereafter as necessary. At that hearing the above-noted appearances were entered on behalf of the applicant and the respondent Graphic Communications International Union Local 500M (also referred to in this decision as the "Union" and as "Local 500M"). Although a number of the individual respondents were in attendance at the hearing, they opted to merely observe the proceedings and declined to enter an appearance or otherwise actively participate.

2. It was apparent from the opening statements of counsel that one of the major issues in dispute between the parties was whether or not at the time of the events to which these applications pertain there was a collective agreement in effect between the Company and the Union in respect of the Roto Gravure bargaining unit, and in respect of the Lithographers bargaining unit. (During the course of the evidence and argument, employees in those two bargaining units were frequently referred to as the "engravers" and the "artists", respectively, which terminology has also been adopted in this decision for ease of exposition.) Consequently, counsel concurred with my suggestion that evidence and argument be initially confined to that issue, on the understanding that further evidence and argument would be heard if any other issues remained outstanding after that issue had been decided.

3. The sole witness called by the applicant was Franklyn Smith, the General Manager of the Council, who was the Company's chief spokesperson throughout the negotiations described below. The only witness called by the Union was Frank O'Reilly, who is one of Local 500M's Executive Vice-Presidents. Twenty-five exhibits were also entered during the course of the hearing. After counsel had completed their submissions concerning the collective agreement issue during the evening of March 14, the hearing was adjourned until the following afternoon, at which time I delivered the following oral "bottom line" decision:

> Having carefully considered all of the evidence and the submissions of counsel, I have concluded that there is no collective agreement in place between the applicant and the respondent union in respect of either of the bargaining units to which these two applications pertain. My reasons for reaching that conclusion will issue in a future written decision. Mr. Morley has acknowledged that he is unaware of any basis on which these applications could succeed in the absence of a collective agreement being in force between those parties. Accordingly, in view of my conclusion concerning the collective agreement issue, these two applications are hereby dismissed.

My reasons for so deciding constitute the balance of this decision.

4. The Council has represented the Company in collective bargaining for many years. The Company's unionized employees are currently divided into four bargaining units. Toronto Printing Pressmen and Assistants' Union, Local No. 10, G.C.I.U., holds bargaining rights for the Company's pressmen and paperhandlers. The employees in that bargaining unit have been locked out by the Company since February 20, 1989. The employees in the other three bargaining units are the Company's artists, engravers, and bindery employees. Local 500M is the bargaining agent for those three units. The three collective agreements that were in force between the Company and the Union in respect of those bargaining units each expired on December 31, 1989. (With respect to its bindery employees, during the period from January 1, 1988 to December 31, 1989, the Company was bound by the "industry agreement" (between the Council and the Union) and a codicil

to that agreement, but in the current round of negotiations the Company elected to separate itself from the industry bargaining and to attempt, through the Council, to bargain a bindery collective agreement covering only the Company.) On October 16, 1989, Earl McDonnell, who is one of Local 500M's Vice-Presidents, sent the Company a notice to bargain in respect of the engravers unit. A similar notice was sent to the Company by Mr. O'Reilly on October 27, 1989 in respect of the artists and bindery units. Bargaining proposals were subsequently exchanged and negotiations proceeded through conciliation, with "no board" reports being issued on February 19, 1990 for each of the three units. Thus, the time as of which legal strikes or lock-outs could begin was midnight of March 7. On or about March 1, the Union arranged for Summons Meetings in respect of each of the three bargaining units to be held on March 8. (Under the By-laws of Local 500M, members for whom a Summons Meeting is called are obligated to attend the meeting or pay a $50.00 fine). There is no direct evidence concerning the purpose or purposes for which those meetings were called, but it may reasonably be inferred that one of the purposes was to update the membership concerning the negotiations.

5. Following receipt of the "no board" reports, mediation was arranged and a combined mediation session was held on March 6, at which the artists and bindery units were represented by Mr. O'Reilly, and the engravers unit was represented by Mr. McDonnell. Near the conclusion of that session, the Company gave the Union three "proposals for settlement" - one for each bargaining unit. Mr. Smith told the Union representatives that this was "as much as the Company could do" and that hopefully the proposals would be ratified but that if they were not there would be no work. When he was asked at that session whether he meant that if one group rejected the proposal there would be no work for employees in all three groups, Mr. Smith clarified the Company's position by indicating that there would be work for any group which accepted and no work for any group which rejected. He also confirmed that by saying there would be "no work", he meant that the employees would be locked out by the Company. Mr. Smith undertook to provide the Union with a sufficient number of copies of the Company's proposals for settlement to enable the Union to give each bargaining unit member a copy. Mr. O'Reilly volunteered to call Mr. smith at the conclusion of each of the two meetings for which he was responsible, to advise Mr. Smith of the voting results.

6. No memorandum of settlement was entered into at the mediation session, nor was anything signed by the Union or the Company. Mr. Smith was made aware at that meeting that the Company's proposals for settlement were not acceptable to the Union and that the Union was going to recommend that the membership reject them. There was no discussion of what the Union's position would be in the event that the employees nevertheless voted in favour of the proposals.

7. At each of the three Union meetings on March 8, employees were provided with the pertinent proposal for settlement (which specified all of the amendments the Company proposed to make to the previous collective agreement), and with a Union document that explained the Company's proposal and outlined the Union's position on each item. Although the Union's position was the same as that of the Company on a few items, in most instances they were different. The results of the votes taken at those meetings were that the employees in the bindery unit voted to reject the Company's proposal pertaining to their bargaining unit, but the artists and engravers voted to accept the Company's proposals pertaining to their respective bargaining units. Mr. O'Reilly informed Mr. Smith of the results of the votes during telephone conversations on March 8 and 9. Upon being informed of the results of the bindery unit's vote, Mr. Smith relayed that information to Jim Robinson, the Company's Plant Manager, shortly before noon on March 8, and the employees in that unit were locked out by the Company as of that afternoon. When Mr. Smith asked Mr. O'Reilly during their telephone conversation on the morning of March 9 how many

employees had voted each way, Mr. O'Reilly was unwilling to disclose the precise numbers but did tell him that the bindery had rejected by a substantial majority, that the artists had accepted by a substantial majority, and that the engravers' vote had been very close. There was no discussion about the consequences of those votes during any of their conversations.

8. After speaking with Mr. O'Reilly on the morning of March 9, Mr. Smith again contacted Mr. Robinson to convey to him the information received from Mr. O'Reilly. Mr. Robinson, who already had that information, informed Mr. Smith that the artists and engravers were not crossing the picket line. Mr. Smith then sent the following letter to Messrs. O'Reilly and McDonnell:

> This will confirm our conversations of March 8, 1990 and March 9, 1990 during which you informed me that your membership, working under three separate Collective Agreements, had dealt with the Company's Proposals for settlement as follows:
>
> Bindery — Voted to reject
> Artists — Voted to accept
> Engravers — Voted to accept
>
> The effective date of the renewed Agreements will be January 1, 1990 to December 31, 1992, and we will proceed to prepare full Agreement for your perusal and signature.
>
> If you disagree with the contents of this letter, I would appreciate you letting me know today.

9. Mr. O'Reilly responded as follows in a letter dated March 12, 1990, which was sent to Mr. Smith by fax and by regular mail:

> We acknowledge receipt of your letter dated March 9, 1990.
>
> We disagree with the contents of your letter.
>
> The principal officers of the Local Union have carefully considered this matter and are of the view that the offers presented are not in the best interest of the Union and its members.
>
> This decision will be reviewed by the full Executive Board of the Local Union later this week. We shall advise you of the determinations made at this meeting.
>
> In the interim, we assume that all our of members will be allowed to work. Please advise us if our assumption is not correct.
>
> We look forward to a resumption of bargaining.

10. Mr. Smith replied as follows in a letter which is also dated March 12, 1990:

> We acknowledge receipt of your letter of today's date in which you disagree with the contents of our letter to you dated March 9, 1990.
>
> We do not understand the basis of your disagreement and ask that you specify the matters in our letter with which you disagree.
>
> In any case the members of those bargaining units which voted to accept the Company's last offer (i.e. the Artists and the Engravers) are bound by Collective Agreements and are therefore obligated to report for work.
>
> Those members of the bargaining unit which voted to reject the Company's last offer (i.e. the Bindery) will not be allowed to work.

11. During his testimony in these proceedings, Mr. O'Reilly confirmed that after he had

conveyed to Mr. Smith the aforementioned information concerning the results of the votes, the Union's Executive Officers met and, after reviewing the Company's proposals for settlement and the Union's last position, decided that the Company's proposals were unacceptable. He also testified that the full Executive Board would be reviewing that decision at a meeting on March 15, and that a meeting had been scheduled for March 16 to inform the membership about what was happening.

12. When he was asked during examination in chief why the three offers were put to a vote in the three groups, Mr. O'Reilly replied, "Because we didn't believe that they would be accepted." During cross-examination, Company counsel suggested to Mr. O'Reilly that in past negotiations with the Company there had never been a resumption of bargaining after membership acceptance. Mr. O'Reilly's response was: "I can only talk about my experience and in my experience, yes, you're correct." There is no evidence concerning the exact time frame covered by that response, but it is reasonable to infer from Mr. O'Reilly's evidence concerning the various positions which he has held in the Local and one of its predecessors that his "experience" covers a number of rounds of bargaining. However, there is also no evidence concerning the circumstances surrounding the "membership acceptance" to which the question refers. Thus, it is unclear if such acceptance arose in circumstances similar to the instant case, or whether it occurred after the Union and the Company had entered into a memorandum of settlement which made the Union's acceptance of a Company offer subject to ratification. In the absence of that important information, this evidence was not of assistance in deciding these applications.

13. In Part II of the Constitution of the Graphic Communications International Union (the "International"), the following is set forth as one of the "laws governing Local Unions":

> Chapter 13.2. All collective bargaining contracts shall be subject to approval by the International President....

After the Local faxed the Company's proposals for settlement to the International's head office, Paul E. Golden, the Executive Assistant to the International President, wrote as follows to Mike R. Zajac, the President of the Local, in a letter dated March 9, 1990:

> The faxed submission of the recent proposals voted on by the Artists and by the Photoengravers are not going to be approved by the International Union. Cursory review by the Contract and Research Department disclosed quickly that conditions in both agreements are substandard to corresponding contracts in Local 500M.
>
> Please advise the Scale Committee of the respected [sic] contracts to reconvene and continue negotiations.

The expired collective agreements between the Company and the Union were signed only by officials of the Local and did not contain any language which made them subject to approval by the International.

14. After writing to Messrs. O'Reilly and McDonnell on March 9, Mr. Smith began to revise the expired collective agreements for the artists and engravers units so as to reflect the amendments included in the Company's proposals for settlement. Draft copies of those revised agreements were mailed to the Union on the evening of March 13.

15. Counsel for the applicant submitted that collective agreements came into force in respect of the artists and the engravers as a result of the foregoing events. Having acknowledged that some Board decisions (such as *Marsland Engineering Limited*, [1970] OLRB Rep. Apr. 133, and *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221) contain statements which indicate

that a collective agreement cannot be found to exist until the parties have finally agreed on all the provisions to be contained in it and have signed a document or documents embodying all of the provisions agreed to, applicant's counsel referred the Board to two additional awards and another Board decision in support of his contention that a more flexible approach is warranted. In this regard he placed particular reliance upon *Re Canteen of Canada and Retail, Wholesale and Department Store Union, Local 414* (1984), 15 L.A.C. (3d) 305 (Mitchnick). In that case, during the course of mediation the employer presented the union with a final offer on all matters in dispute. That offer was not accepted by the union negotiating committee but was presented to the employees and accepted by them at a meeting called by the union. The union subsequently advised the employer that the offer had been accepted and confirmed this in a letter from the union's business agent, who closed the letter with the following sentence: "I would appreciate 8 copies of each contract signed hopefully in the near future." Notwithstanding the fact that it was "clear to all that the negotiations were over", and the fact that the agreed-upon wage increases had been immediately implemented by the employer, in arbitration proceedings concerning a discharge the employer argued that the grievance was not arbitrable because, at the time of the discharge and grievance, no collective agreement was in effect as no employer signature appeared on any of the documents exchanged by the parties. In rejecting that argument, the arbitrator wrote as follows (at pp. 307-12):

> Labour and arbitration boards have long held that the existence of a collective agreement is not dependent upon the execution of a formal document, which traditionally occurs a good deal later than the successful conclusion of negotiations. Because of what rides on it in terms of the tabling of new positions or resort to economic sanctions, what tribunals have always required is a certainty that the bargaining has been brought to an end, as well as sufficient documentation of the settlement that its precise terms can be identified and interpreted by a third party, if necessary. As the Ontario Labour Relations Board stated in *U.E.W. v. Marsland Engineering Ltd.*, [1970] O.L.R.B. Rep. 133 (O'Shea) at p. 138, para. 13 for example:
>
> > ... until such time as the parties complete their negotiations by resolving all outstanding issues and bring their bargaining to an end, it cannot be said that a collective agreement has been consummated.
>
> The important thing is that the parties know when their negotiations are complete, and the simplest indication for an adjudicator that that has occurred is a clear statement to that effect signed by each of the parties. Experience has shown, however, that negotiations are not always concluded in quite such a model form, and labour tribunals have had to take care to respond to the realities of how collective bargaining takes place. This is the thrust of the remarks of the Ontario Labour Relations Board once again, for example, in *Graphic Arts Int'l Union, Local 12-L v. Graphic Centre (Ontario) Inc.*, 76 C.L.L.C. para. 16,041, [1976] O.L.R.B. Rep. 221 (Burkett). There the board observed [pp. 615-6 C.L.L.C.]:
>
> > 11. The Act defines a collective agreement as follows:
> >
> > > "collective agreement" means an agreement in writing between an employer or an employers organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees.
> >
> > The collective agreement is the cornerstone of our labour relations system. It evidences the existence of bargaining rights and other than during a stipulated period serves as a bar to either the termination or transfer of these rights. It evidences a bargain struck between the parties as to terms and conditions of employment for a term specific and requires that any dispute as to its interpretation, application or administration be resolved by binding arbitration. Its existence or lack thereof can be deter-

> minative of the legality or illegality of certain activities engaged in by an employer, a trade union or by employees. The Board in lending an interpretation to section 1(1)(e) has been influenced by both the realities of the collective bargaining process and by the practical need for consistent and easily understood criteria. The parties to collective bargaining do not normally execute a formal document until some time after the bargaining process has been completed. The process is one wherein the agreement of the parties is reduced to a memorandum of settlement subject to ratification by the respective principals which is then followed by the drafting and execution of the formal document. It would not be sound industrial relations policy to require as a condition of entering into a collective agreement the execution of the formal document thereby precipitating an often prolonged extension of the open period. The parties, however, must know, with a high degree of certainty and predictability, precisely when they have entered into a collective agreement so as they may properly assume their respective duties and responsibilities and conduct themselves in a manner consistent with the existence of a subsisting collective agreement.

Normally, the last step in the collective bargaining process is employee ratification, and tribunals have initially held that this pre-condition of a settlement must be evidenced in writing before a collective agreement can be said to have been unequivocally achieved. But that requirement quickly led to results that were unrealistic and unwarranted, and room had to be made for a more flexible approach, although carefully reserved for appropriate cases. The *Graphic Centre* case, once again, expanded on this point as follows [pp. 616-7 C.L.L.C.]:

> 13. In a number of cases the Board has been faced with situations where the parties have signed a memorandum of settlement subsequent to which confusion has arisen as to whether ratification has occurred. In certain of these situations the Board has responded to the extrinsic evidence and drawn the inference that ratification has occurred without there being signed evidence of this fact. (See *Versa Services Limited* case [1972] OLRB Rep. Apr. 306, *Service Employees Union Local 210* case *supra*, *Field-Price Limited* case [1973] OLRB Rep. Oct. 543.) In other similar situations however the Board has stated that the parties must signify their ratification of the memorandum in writing (see *Marsland Engineering Limited* case *supra*, *Civil Service Association of Ontario* case [1971] OLRB rep. Sept. 596) in order for there to be a collective agreement within the meaning of the Act. Although each case must be considered within its own circumstances a signed memorandum of settlement coupled with *compelling* evidence of ratification must be considered by the Board as evidence of a collective agreement within the meaning of the Act. Whereas a Memorandum of Understanding subject to ratification is not a collective agreement (see *John Inglis Co. Ltd.* case [1974] 1 Can. LRBR 481 (B.C.)), evidence which clearly establishes that ratification has occurred elevates the memorandum to the status of a collective agreement within the meaning of the Act. Ratification satisfies the condition precedent thereby giving rise to what is then an unconditional agreement in writing (i.e. signed by the parties) on all outstanding matters. Although signed evidence of ratification is perhaps the most satisfactory evidence in this regard, the Board cannot ignore other evidence which supports the singular inference that ratification has occurred. It should be added that if the Board were to require signed evidence of ratification in all cases it would be denying the parties use of the equitable doctrine of estoppel in those situations where there is evidence of ratification, other than signed notification which has been relied upon by one or the other of the parties. (See *Garden City Laundry Limited* case [1970] OLRB Rep. May 240.)

I can see no logical reason for rejecting this kind of common sense approach when what is at issue is not employee ratification but, for example, whether the company, for its part, has unequivocally signified its acceptance of the written terms of settlement. It seems to me that so-called expert labour tribunals inexcusably fail to serve their constituency if they cannot have regard to that kind of reality. This seems particularly so when one considers that the courts, in dealing with the Statute of Frauds, which, as union counsel points out, was passed for the *sole purpose* of requiring certain types of agreements to be in writing, soon developed a principle of finding the contract to exist where "signed writing was lacking but other convincing proof was present": *Cheshire and Fifoot's Law of Contract*, 8th ed. (1972), p. 142).

It seems to me that that is precisely what was being done in the labour board's *Versaservices Ltd. v. Canadian Union of General Employees* [1972] O.L.R.B. Rep. 306, (Shime), cited to me by the union. There the company considered that negotiations had been concluded, and sent the union in the usual way unsigned collective agreements in draft for the union's perusal. The signature of the company's industrial relations officer was on the letter accompanying the documents, but no company signature was on the documents themselves, and the case was dealt with as one with an absence of company signature formally accepting the terms of settlement. The board wrote [p. 311]:

> We are also of the opinion that the preparation of the collective agreement by Versaservices Limited in accordance with the terms of the Memorandum of Settlement and the forwarding of that collective agreement to the union for signature is sufficient indication in the circumstances of this case that the employer had accepted the terms of the collective agreement pursuant to paragraph 2 of the Memorandum of Settlement.

The apparently absolute statements of the labour board contained in the *Marsland Engineering* case and cited in the *Graphic Centre* case, and upon which the company is relying, in my view must be read in light of the ambiguity which surrounded the alleged settlements in both of those cases. One of the statements in *Marsland Engineering, e.g.*, was as follows, at pp. 138-9, para. 13:

> Until the parties have finally agreed on all the provisions to be contained in the collective agreement and have documented their agreement and have agreed on the date of commencement and the term of operation or duration of the agreement and have evidenced the existence of their agreement by affixing their signatures to the document or documents which embodies all the provisions agreed to, it cannot be said that the parties have executed an agreement in writing which can be characterized as a collective agreement within the meaning of section 1(1)(c) of the Act. *It may be that at common law the parties have an enforceable contract if the doctrine of part performance or estoppel applies, however, such common law contract is not necessarily a "collective agreement" within the meaning of the Act.*

(Original emphasis.) But in *Graphic Centre* the union was itself talking about a strike vote after the date that it later alleged bargaining to have been completed. Noting this uncertainty in the union's own perception of the negotiations, the board wrote [p. 617]:

> There is no signed evidence before the Board which would allow the Board to conclude that at a particular point in time the bargaining process had been completed and the parties were *ad idem* with respect to all the terms and conditions of employment. The Board has before it a signed offer by the company dated February 24, 1976 ... and a signed covering letter from the union March 12, 1976 which was enclosed with unsigned draft copies of the proposed collective agreement ... The Board cannot conclude that these two documents, *when taken in the context of this case*, constitute a collective agreement.

(Emphasis added.) The board then refers to the union's own ambiguity concerning a strike vote and its legal strike position and added:

> There is evidence before the Board which does not permit the Board to conclude that the parties were *ad idem* as of March 12, 1976, the date upon which the union first signified, although somewhat obliquely, its acceptance of the company offer of February 24, 1976, and the first time as of which the required union signatures were affixed to any documents.

In *Marsland Engineering* the negotiations were for a first agreement and not all terms of the agreement had been fully fleshed out. The union notified the company only orally that the company's offer had been accepted and the company began to balk immediately when it learned at the same time that a majority of employees had voted against the offer and in favour of a strike. In the context of those two cases, as well as developments in the cases since 1970 when *Marsland Engineering* was decided, the apparently bald statements in *Marsland*, such as at p.

> 140, para. 16, that "the only way that an individual can evidence his agreement in writing is by signing his name or perhaps by signing his initials to a document which contains or identifies the provisions agreed to in such a manner that his intent to consummate the agreement is clear" must be qualified by an introductory phrase like "where the slightest ambiguity in a party's intention exists". I do not believe that that case ever meant to say more than that, and if it did, I do not believe that it represents the law as it exists today.
>
> In the present case, the proposed terms of settlement now relied upon by the union were the terms proposed by the company itself. They were handed across the bargaining table and were clearly stated to represent the basis on which the company was prepared to settle the contract. The only question left open for the parties at that point was whether the employees would accept it. The employees did in fact accept and the company received from the union unequivocal confirmation in writing that that was the case. All of the terms of settlement had been set out in the document which the company had tabled on February 17th, and nothing remained to be done except formal execution of the so-called "long form" of collective agreement.
>
> Can it really be said that the parties would be in a different legal position today if the company representative, in handing the final offer across the table on February 17th, either directly or through the mediator, had attached a letter signed by himself saying "attached is our final offer", or had happened to scrawl his signature or initials at the bottom of the final offer document itself? I think not. The parties knew that they had a deal on February 28th, when the union advised that the offer was accepted, and they know that they have a deal today. I agree with Mr. Hayes that on the basis of the agreed facts, the union could undoubtedly petition the labour board to direct the company to execute the formal agreement under the provisions of ss. 15 and 89 of the *Labour Relations Act*. But that is unnecessary. As Mr. Hassell, on behalf of the company, candidly points out, there is, apart from the issue over this grievance, no reason whatever why the company would not now voluntarily execute such a formal agreement. And that is because, as everyone knows, the negotiations for this renewal agreement have been completed. The terms of settlement are in writing and clearly identified and the union's acceptance of the company's proposal, the only issue left open from the February 17th meeting, has been unequivocally evidenced in writing. I am satisfied that there presently exists between the parties a collective agreement within the meaning of s. 1(1)(e) of the *Labour Relations Act*. I would only add, to keep the issue in perspective, that I would have come to the same conclusion had the *union*, subsequent to February 28th, become disenchanted and led the employees out on strike, and had the issue before me then been the lawfulness of that strike.

16. A similar approach was adopted in *Re Mississauga Hydro commission and International Brotherhood of Electrical Workers, Local 636* (1984), 17 L.A.C. (3d) 299 (P.C. Picher). Both of those awards were cited with approval by the Board in *Sears Canada Inc.*, [1986] OLRB Rep. Aug. 1159. After quoting from each of them, the Board wrote:

> 11. We are inclined to accept this general approach which, in our view, is in accordance with the realities of collective bargaining. The fact is that (as in the instant case) hard bargaining and the possible threat of a strike or lockout frequently lead to a document or series of documents (sometimes handwritten, modified or amended at the eleventh hour) which together constitute a final settlement of the matters in dispute. So long as the terms of the settlement do not themselves contemplate further bargaining and both parties purport to ratify the agreed terms of a settlement, we do not think that we should lightly conclude that there is no collective agreement in effect - even though the parties may wish to "tidy things up" by incorporating all changes, amendments, or final agreements on individual issues into a single more formal document. To hold otherwise would encourage parties to resile from written settlements which, at the time, were regarded as a final resolution of their collective bargaining dispute, but may have lacked the form or formalities usually associated with a collective agreement.

17. I also respectfully agree that the approach embodied in those awards is in accordance with the realities of collective bargaining and represents the present state of the law in Ontario. However, each of those cases is distinguishable from the instant case. In *Sears Canada Inc.*, there was a signed memorandum of agreement which had been ratified by each of the parties. In *Mississauga Hydro*, the parties' negotiations were concluded by a written document which

expressly indicated that it constituted "full settlement of all matters in dispute and shall be recommended by the Committees to their respective principals." That document also bore a "crude form of 'signatures' ", and had been ratified by each of the parties. Although the facts in *Canteen of Canada* are similar to those of the instant case in a number of respects, there is an important difference. In that case, the union obviously elected to accept the employer's final offer on the basis of its acceptability to the employees. As noted above, the letter from the union's business agent to the employer confirmed the acceptability of the offer and closed with a sentence requesting eight signed copies of each contract. In the instant case, Mr. O'Reilly advised Mr. Smith of the results of the votes taken at the Union meetings but did not at any time indicate that the Union was prepared to treat those votes as dispositive or that, in light of the vote results, the Company's offers had become acceptable to the Union. Quite to the contrary, when Mr. O'Reilly became aware through Mr. Smith's letter of March 9 that the Company was mistakenly of the view that the votes had resulted in collective agreements coming into force in respect of the artists and engravers, he responded by means of his faxed and mailed letter of March 12 which expressed disagreement with the contents of Mr. Smith's letter, indicated that the principal officers of the Union had concluded that the Company offers were not in the best interest of the Union and its members, and closed with the following statement: "We look forward to a resumption of bargaining."

18. The votes conducted by the Union in the instant case were not ratification votes. Such votes are typically conducted after an employer and a union have entered into a memorandum of settlement by which they agree upon all of the terms to be included in a collective agreement, subject only to ratification by the employees in the bargaining unit and by the principal(s) of the employer. In that type of situation, it is well established in the Board's jurisprudence that once such ratification has occurred and been communicated, the parties are bound by a collective agreement: see, for example, *Sears Canada Inc.*, *supra*. It is also possible for a union to enter into a memorandum of agreement with an employer by which the union agrees to conduct an employee vote on an employer offer that the union is not prepared to recommend to the employees, and by which the union further agrees to be bound by the results of the vote. However, no such memorandum was entered into in the instant case, and the evidence falls far short of establishing that there was any tacit agreement to that effect. Indeed, the constitutional requirement that all collective bargaining contracts be subject to approval by the International President, although by no means dispositive of these applications, does reinforce the unlikelihood that the Union intended to be bound by the results of the votes.

19. Counsel for the Company also sought to analogise the votes in this case to votes under section 40 of the Act. However, the votes conducted by the Local in the instant case were not votes directed by the Minister under section 40 of the Act in respect of "the offer of the employer last received by the trade union". In order to obtain such a vote, an employer must make a request to the Minister. The uniqueness of such a vote is emphasized by the fact that section 40 provides that once such a request has been made, "thereafter no such further requests shall be made." Moreover, even in the context of section 40, a majority vote in favour of accepting the employer's last offer does not automatically create a collective agreement: see *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583. That decision also indicated that the substantive provision of the Act which enables the Board to deal with a union's refusal to sign a collective agreement on the basis of a section 40 vote is section 15 (then section 14) of the Act. In the present case, neither of the applications contains an allegation that the Union has contravened section 15. Thus, it is unnecessary to determine whether such an allegation could be adjudicated and remedied in proceedings under section 92, or whether the Board would only do so in a complaint under section 89 of the Act.

20. Company counsel also argued that a collective agreement had come into force as a

result of the artists' and engravers' votes by virtue of basic contract law. It was his contention that the employer's offer had been accepted by the employees. However, as submitted by Union counsel, although section 50 makes it binding upon bargaining unit employees, a collective agreement is a contract between an employer and a union, not between an employer and bargaining unit employees. This is clear from the section 1(1)(e) definition of "collective agreement", and is reinforced by various other provisions of the Act, including sections 41, 64, and 67. It is also well established in the Board's jurisprudence. See, for example, *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309, in which the Board made the following observation (in paragraph 21): "While it is true that when a union is certified to represent a unit of employees it becomes the 'exclusive bargaining agent' of the employees, it is more than simply an agent of the employees. Rather, so long as it continues to hold bargaining rights, it has a status independent of the employees and deals with the employer, and enters into collective agreements in its own right." (See also *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337, and the authorities cited therein.) Thus, subject to the aforementioned considerations relevant to section 40 votes, if an employer offer is to become a collective agreement, it must be accepted by the union. In deciding whether or not to accept such an offer, a union must give due consideration to the results of employee votes concerning the acceptability of the offer. However, unless the union has agreed with the employer to be bound by the voting results, it will not automatically be bound by them. Indeed, the Board has held that, in appropriate circumstances, a union may accept an employer offer which bargaining unit employees have voted to reject: see, for example, *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421. In so finding, the Board indicated that a heavy onus lies upon a union which flouts the will of the majority of the employees in the bargaining unit, to demonstrate that its conduct does not amount to a breach of section 68. Although Company counsel referred to section 68 in the course of argument, that provision was not pleaded in either of the applications. Moreover, the section 68 duty is owed not to the employer but to bargaining unit employees. Thus, as acknowledged by Company counsel, an employer is not entitled to rely upon that provision. Accordingly, the Board is not called upon to decide, and expresses no opinion on, whether the Union contravened section 68 of the Act in the circumstances of this case.

21. Counsel for the Company further submitted that unless the Union was bound by the results, the votes conducted by the Union would be an academic exercise. However, such votes can and frequently do have a significant effect on a union's bargaining power. In the instant case, the Union conducted the aforementioned votes with the expectation that the employees would reject the Company's offers, thereby strengthening the Union's bargaining position. The results of the artists' and engravers' votes clearly came as a surprise to Mr. O'Reilly, and obviously did not fortify the Union's bargaining position in respect of those units. Thus, there clearly are risks associated with such votes, even in the absence of an agreement to be bound by the results.

22. For the foregoing reasons, the Board concluded that there was no collective agreement in place between the Company and the Union in respect of either the artists or the engravers. Consequently, the applications were dismissed.

0977-86-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 and International Brotherhood of Electrical Workers, Local 353, Complainants v. **Pigott Construction Limited** and United Brotherhood of Carpenters and Joiners of America, Local 27, Respondents v. Labourers' International Union of North America, Local 506, Intervener

Collective Agreement - Construction Industry - Jurisdictional Dispute - General contractor assigning installation of patient service modules in hospital to its own carpenters and labourers - UA and IBEW claiming work - General contractor having no collective agreements with UA or IBEW but area past practice favouring claim - IBEW provincial agreement containing restrictive hiring practices - Practical effect of claim is to make it a request that the Board direct the general contractor to subcontract the work - Assignment of work to carpenters and labourers confirmed

BEFORE: *N. B. Satterfield,* Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn.*

APPEARANCES: L. C. Arnold, Vincent McNeil and *William Robinson* for the complainants; *Pam Yudcovitch, R. A. Werry* and *James Vair* for Pigott Construction Limited; *James J. Nyman* and *Lorenzo Monaco* for United Brotherhood of Carpenters and Joiners of America; *Eric Donaldson, Dave Strang* and *Manuel Silva* for the intervener.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER W. GIBSON; April 10, 1990

1. The name of one of the respondents is amended to read: "United Brotherhood of Carpenters and Joiners of America, Local 27".

2. This is a complaint made under section 91 of the *Labour Relations Act* concerning a work assignment dispute. The dispute arose on a project at St. Joseph's Hospital in Toronto on which the respondent, Pigott Construction Limited (hereafter "Pigott"), was the general contractor for the renovation of an existing building of the Hospital and the construction of a new building. The parties referred to the one being renovated as the "retrofit building" and to the new one as the "core building". The Board will use those terms as well. The complaint arises out of the installation of patient service modules in the patient rooms of the two buildings. Three hundred units were to be installed in the retrofit building and one hundred in the core building. The project was winding down when the hearings into this complaint commenced.

3. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 and the International Brotherhood of Electrical Workers, Local 353 claim that the patient service modules on the project should have been installed by a crew composed of equal numbers of plumbers, members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, and electricians, members of the International Brotherhood of Electrical Workers, Local 353. Carpenters and construction labourers employed by Pigott installed them. The bargaining agents for Pigott's carpenters and construction labourers are the respondent United Brotherhood of Carpenters and Joiners of America, Local 27 and the intervener Labourers' International Union of North America, Local 506. For ease of reference, the Board will refer to the four trade unions, respectively, as the UA, the IBEW, the Carpenters and the Labourers.

4. The specific work in dispute involves transporting from a central storage area to the

point of installation and installing patient service modules on the walls of patient rooms, including the fitting of face panels and final clean-up. The modules, when fully equipped, house devices which bring electrical and medical gas services such as lighting, nurse calls, television hook-ups, telephones, oxygen and vacuums into patient rooms. Each of the four types of modules installed on the St. Joseph's Hospital project were made of sheet aluminium. Each is almost floor to ceiling in height and varies in width depending on whether the module serves one or two beds. Two large, removable face panels in each module provide access to the piping and to the flexible electrical conduit inside the box. The face panels fit into channels in the box's frame. The electrical and medical gas devices in a finished module are contained in two compartments which extend the width of the modules. One compartment houses the electrical devices and the other the medical gas devices. Access to the devices is gained by removing a compartment's cover plate. The modules were empty when installed except for a copper pipe and a flexible conduit. The two face panels were removed for installation, but not the two cover plates.

5. Pigott's construction labourers assisted its carpenters with transporting the modules from a central storage point on the floor where modules were being installed to the point of installation and did the final clean-up. The carpenters installed the modules and fitted their face panels. Installing the modules involved identifying their proper location on the wall of the patient room from a blueprint and anchoring them with screw fasteners to the finished drywall. There were some minor differences in the way the modules were installed in the two buildings, but the essential work functions were as follows. The module was loaded onto a flat, hand cart at a central storage point and taken to the point of installation in a patient room where it was unloaded. The face panels were removed from the unit and marked with the room number. The precise location where the module was to be fixed to the head wall of the patient room was identified using a center line previously marked on the wall and a blueprint on which the patient room is shown. A plumb line was marked on the wall to show the module's location. The module's frame was raised into position and the location of pre-drilled anchor holes in the frame were marked on the wall. Pilot holes were drilled at these marks. If they showed the location not to provide suitable anchoring, the location was adjusted to achieve that purpose. Holes were drilled in the wall at the final location to receive the anchors for the type of screw fastener being used. The anchors were set in those holes. In the retrofit building, the pre-drilled holes in the frame were enlarged to allow for minor adjustments in the placement of the module on the wall. The frame was raised into place and fastened to the wall with the screw fasteners and, after it was checked for squareness, the screw fasteners were tightened. In the retrofit building, the modules were anchored into the masonry block of which the wall was constructed. In the core building, backing boards had been previously attached to the wall studs before the wallboard was applied. It was necessary to find the location of these backing boards from the blueprints before mounting the modules. The modules in the core building were anchored by screw fasteners through the wall into the backing boards.

6. The frames of approximately 35 of the modules installed in the retrofit building and two of those installed in the core building had to be altered on site in order to fit the walls in some patient rooms. Altering them involved cutting excess metal from the frame's length so that it would fit the available space. These alterations were made by either of the two carpenters who were installing the modules. The work of altering the frames of the units in the retrofit building was performed in the Hospital's carpentry shop using equipment belonging to the Hospital. An electric hand saw with a carbide-tipped blade was used to cut the sheet metal frame, after which the top end of the frame had to be re-attached using sheet metal screws. The two modules in the core building were altered in a similar fashion, using an electric hand saw, but the cutting was done in the patient room where the modules were to be mounted. When the frames had been adjusted, one of the carpenters also cut the larger of the two face panels to fit the new size of the unit. The panels for the modules in the retrofit building were cut on a table saw in the Hospital's carpentry

shop. Approximately 35 modules had been modified before the modules were delivered to the Hospital. The carpenters who installed these units also modified their face panels.

7. The face panels were installed in their modules after the IBEW electricians and UA plumbers had installed and hooked up the module's devices. The face panels were installed by slipping them into the channels or tracks provided for them. In the retrofit building, this work was done by the Carpenters and, on some of the units, it was necessary for them to trim the panels so that they would fit properly into their tracks. The trimming was done with a smooth plane. The panels for the modules in the core building were installed by the carpenter foreman and there is no evidence whether these panels required any trimming.

8. Pigott had been general contractor on other hospital construction projects before undertaking the job at St. Joseph's. It is, however, the first such job for which its contract included installation of patient modules or any panels or boxes which were to contain devices supplying medical gases or electric and electronic services to patient rooms. On all of its previous hospital jobs, that work was included in the electrical division of the contract. The work was bid to Pigott and performed for it by electrical trade contractors. Pigott knew of no reason why the modules at St. Joseph's were specified by the architect to be part of its work. It is also the first of Pigott's hospital jobs on which carpenters have installed patient service modules.

9. Pigott, like many general contractors, employs carpenters and construction labourers on its projects. It does not employ plumbers and electricians directly and does not wish to do so. Whenever it needs those trades it usually obtains them from a subcontractor who charges Pigott for their wages. Pigott has no collective agreements with either the UA or the IBEW and, while the UA stated that it would supply its tradesmen directly to Pigott, the IBEW would not. The IBEW's position is based on an undertaking in clause 402 of the electricians provincial agreement that no party "...whose business is not recognized as electrical work." will be signed to the agreement. Ron Carrol, the IBEW business agent at the time, told the Board that Pigott is not an employer who would be signed to the agreement and, without the agreement, the IBEW would not supply electricians directly to Pigott. Pigott decided to perform the work using its own carpenters because it knew the quality of their work, they were always present on the job and would be available to install the modules as they were delivered to the job site. Pigott also took into account the fact that, if it acquired electricians and plumbers from subcontractors and performed the work with them, it would have to pay a mark-up to the subcontractors on the wages paid to the tradesmen. Pigott made that decision based on its general experience with the bidding practices of subcontractors and without seeking bids on the work.

10. Pigott and the Carpenters are bound to the carpenters provincial agreement. Schedule "A" of that agreement sets out the work which the Carpenters claim to belong to their trade and to be covered by the provincial agreement. Schedule "A" claims the following kinds of work, amongst others:

> (1) "...the...assembling, erecting, fastening...of materials of wood, plastic, metal, fibre, cork and composition, and other substitute materials;"
>
> (2) "[t]he installation of laboratory, institutional fixtures, and equipment, also cabinets, and work-benches, bookcases and cabinets, either separately or in connection with heating or air conditioning units;...";
>
> (3) "[t]he handling and installation of all mill and cabinet work."

Clause 19.01 of Article 19 - Work Jurisdiction states as follows with respect to Schedule "A":

> 19.01 The assignment of all work claimed in Schedule "A" and which is in accordance with established local area work practice shall be to members of the United Brotherhood of Carpenters and shall take precedence over any assignment awarded by any method of jurisdictional disputes settlement.
>
> Where it can be established, local area work practice shall be as under the Collective Agreements which were in force prior to April 30, 1978 and April 30, 1979, in Sarnia Local 1256.
>
> For the purpose of this Article "local area" shall mean the geographical jurisdictional area or areas of the local unions or district councils.

Pigott and the Labourers are bound to the labourers provincial agreement. Schedule "E" of the agreement includes a claim for tending carpenters and states that "[t]ending shall consist of preparation of materials and the handling and conveying of materials.". Clause 2.06 of the labourers provincial agreement provides as follows:

> 2.06 (a) Schedule "E" to this Collective Agreement constitutes a list of work that is claimed by the Union.
>
> (b) Where work within Schedule "E" is claimed by the Union and is within the I.C.I. Sector and there is no work claim dispute within the meaning of Article 8.01 the work will be assigned to employees represented by the Union.
>
> (c) In the event an Employer is found to have violated the provisions of 2.06 (b) above the Employer shall re-assign such work to employees represented by the Union and no claim for damages will be made.

The collective agreements to which the IBEW and the UA are bound, but which are not binding on Pigott, contain broad work jurisdiction claims which would incorporate the work in dispute.

11. The UA, IBEW and Carpenters each filed copies of the constitutions of their respective international unions which are binding on them. Each includes a broad claim to jurisdiction over certain work as the exclusive preserve of its trade, the trade union organization and members. Those claims incorporate the work in dispute but do not specifically refer to it. An example of their claims may be found in the quotation at paragraph 10 above in the quotation from item 1 of Schedule "A" of the carpenters provincial agreement. The same language is used in the Carpenters' constitution to describe its work claims for the carpentry trade.

12. The complainants called extensive evidence about the installation of medical gas and electrical services on hospital construction projects in Metropolitan Toronto and its vicinity. The only other hospital project, of which there is evidence, where patient service modules closely similar to those at St. Joseph's Hospital have been installed was at Credit Valley Hospital in 1985 and 1986. They consisted of a frame made of sheet aluminium with a single face panel made of core board covered with an arborite laminate. Nearly 1000 of them were installed by members of the Carpenters employed by the general contractor. The modules were empty when they were installed but were to house devices supplying medical gas and electrical services to patients. Ron Carrol, Business Agent of the IBEW at the time of the project, told the Board that this was the first time that he had seen patient service modules with panels made of laminate-covered core board. The next, and only other time that he had seen them was at St. Joseph's Hospital. The Credit Valley Hospital project was also the first time he had known members of the Carpenters to install patient modules.

13. Carrol sought to have the general contractor on that project assign the work to electricians and plumbers. When a meeting with the contractor and representatives of the Carpenters and the UA failed to achieve that change, the IBEW's international parent filed a complaint with the

Impartial Jurisdictional Disputes Board under the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. Carrol was informed later by his international union that the Chairman of that board would not process the complaint because the board was not functioning at the time and the project was close to being completed. No complaint about the work assignment was made under section 91 of the Act.

14. There have been projects at other hospitals where patient service modules generally similar to the ones at issue have been installed. At Toronto Western Hospital 250 modules supplying medical gas and electrical services were installed in examining rooms. These units were the same as one of the module styles installed in St. Joseph's, except that they were four feet in height instead of nearly floor to ceiling. At other hospitals there have been patient service modules installed which were similar to those at St. Joseph's except for the fact that the face panels were made of vinyl-clad sheet metal. Approximately 60 such wall-mounted units were installed in Mississauga General Hospital, and 12 were installed in each of Peel Memorial Hospital and Wellesley Hospital. Except for 4 units at Peel Memorial which contained electrical components only, all of these modules were installed by crews composed of equal numbers of UA plumbers and IBEW electricians. Approximately 100 to 150 modules similar to those at St. Joseph's have been installed in the intensive care unit at Scarborough Centenary Hospital. The face panels of these units were made of opaque acrylic. The units were floor-to-ceiling in height. Approximately one dozen on one floor had to be cut because the floor slab had been poured too thick. The aluminium frame and acrylic panel were cut by saw. In each room, several modules were installed on the finished drywall, abutted one to the other so that they appeared to be the wall. Even though the modules were to include components for medical gases, they were installed by IBEW electricians. One of the electricians who worked on the installation testified that, had UA plumbers claimed the work, the installation would have been done by a crew composed of both trades. On most of these projects carpenters represented by the Carpenters were working on the projects when patient service modules were being installed. They made no demand for the work to be assigned to them.

15. The work methods used to install the modules which were closely or generally similar to those installed at St. Joseph's Hospital were substantially the same as the methods used to install the patient service modules in issue. The only evidence of any need to cut the frames and panels of the modules at the other hospitals is the evidence respecting Scarborough Centenary Hospital.

16. There was evidence of substantial quantities of a type of patient service module referred to as a horizontal strip module installed in some of these hospitals and nine others in the area. In most instances the modules provided both medical gas and electric services. In a few instances, they provided only electric or electronic services. When they contained devices for both services, they were installed consistently by crews composed of both UA plumbers and IBEW electricians. When they provided electrical services only, they were installed by IBEW electricians. The sheet metal frames for these units were recessed into the wall cavity and anchored by screw fasteners to the wall studs before the drywall was applied. After the devices were installed and hooked up, they were covered by a removable face plate. The face plates were metal or vinyl-covered metal. In some installations, electrical receptacles made of thin-gauged steel were used in place of sheet metal frames. The receptacles were fastened together in gangs and mounted between the wall studs in the same manner as the sheet metal frames to house the medical gas and electrical devices. When finished, they also were covered by a removable, vinyl-covered face plate.

17. Installation of the different types of patient service modules on the hospital construction projects in evidence was performed under subcontract from the project general contractors, usually to the electrical contractor and, if not, to the mechanical contractor. Pigott was general contractor on four of the projects prior to St. Joseph's Hospital. On all four, Pigott subcontracted the

installation of patient service modules to an electrical contractor along with all of the other electrical work in the electrical division of Pigott's general contract. On all four projects, the modules were part of the equipment and work in the electrical division of Pigott's general contract which it subcontracted as a package to an electrical trade contractor. The IBEW electricians and UA plumbers who installed the modules were employed by the electrical and/or mechanical contractors on the projects.

18. The Board has before it as well, evidence that UA plumbers and IBEW electricians in Metropolitan Toronto and vicinity regularly install sheet metal boxes and panels varying in size from four inches square to several feet in length or width. They are installed in all types of commercial and industrial construction to house plumbing and electrical devices. They may be wall mounted or recessed, involving similar work methods to those employed in installing patient service modules. There is little need, however, to cut them to fit the available space.

19. The Board gets its jurisdiction to adjudicate work assignment complaints from subsection 91(1) of the *Labour Relations Act* which states:

> 91.-(1) *The Board may inquire into a complaint* that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or *that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.*
>
> [emphasis added]

The jurisdiction of this panel of the Board in this complaint comes from the emphasized words of the subsection. The complaint of the IBEW and the UA is that Pigott is assigning the work in dispute to persons in the Carpenters and the Labourers rather than to persons in the IBEW and the UA.

20. When the Board adjudicates work assignment disputes in the construction industry it may consider a variety of criteria in making a direction under subsection 91(1). The evidence and representations of the parties in this complaint bring into play the following criteria: collective bargaining relationships, jurisdictional agreements and arrangements, skills and training, economy and efficiency, employer past practice, employer preference and area past practice. However, having applied those criteria to the evidence before the Board, it finds that all but two of the criteria produce a neutral result; that is, they favour neither the complainants nor the Carpenters and the Labourers. Only two of them have any significance for deciding how the work in dispute should be assigned. They are collective bargaining relationships and area past practice. The first favours Pigott's assignment of the work to carpenters in the Carpenters union and construction labourers in the Labourers union. The second points in the opposite direction and favours the complainants' claim. The difficult question is which criterion should decide the assignment.

21. While all parties argued that several criteria favoured their positions on the assignment of the work in dispute, their principal arguments were focused on the two criteria which the Board has found are the only ones significant to deciding the proper assignment of the work in dispute. The parties' arguments illustrate quite starkly the tug-of-war between those criteria, although no party's argument gave any credence to the criterion which pointed in the opposite direction of its interest.

22. A substantial part of the argument of complainants' counsel was directed to showing that area past practice overwhelmingly favours assigning the work in dispute to IBEW electricians and UA plumbers. The particular past practice evidence on which counsel focused his argument was that during the 13 years prior to the St. Joseph's Hospital project, except for the Credit Valley Hospital, the kind of work in dispute at St. Joseph's invariably has been subcontracted to electrical or mechanical trade contractors and performed by IBEW electricians and UA plumbers employed by them. Moreover, counsel argued, the area practice developed without challenge from the Carpenters. The important weight to be given to that past practice is not diluted by the absence of any collective bargaining relationship between Pigott and the complainants, according to counsel. In this regard, he draws an analogy with the circumstances in *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143. The employer, Brunswick, who had control over the work in dispute (drywall taping) had assigned it to members of the Bricklayers union with which Brunswick had no collective bargaining relationship. Brunswick had acquired the work by subcontract from the general contractor on the project. When the Painters union which was bound together with Brunswick to a collective agreement which expressly covered drywall taping demanded that Brunswick assign the work to its members, the Bricklayers filed a work assignment complaint with the Board. The Board directed Brunswick to continue to assign the work to members of the Bricklayers union. Drywall taping had been performed in the local area where the dispute arose almost exclusively by members of the Bricklayers union. Therefore, even though Brunswick did not have a collective agreement with that union, the Board was persuaded that there was "...little reason to disturb what appears to be a successful and long lived work jurisdiction the exercise of which has caused no industrial unrest.".

23. Counsel for the complainants relies on *Brunswick Drywall* for the proposition that a collective agreement between an employer having control of the work assignment and the union claiming the work in a section 91 complaint is not critical to the success of the claim. Finally, counsel submits that, were the Board to uphold Pigott's assignment, the Board would be saying, to a large extent, as long as an employer like Pigott had a collective agreement with its employees, it could assign any work within its control to its employees no matter how valid the claim to the work of a union disputing the assignment, if that union and the employer are not bound to a collective agreement covering the work. According to counsel, that is not the kind of result which the Act seeks to achieve with section 91.

24. Counsel for the Carpenters, the Labourers and Pigott argued just as strenuously that the absence of any collective agreement covering the work between Pigott and the complainants and the existence of collective agreements between Pigott, the Carpenters and the Labourers, was by itself dispositive of the complaint without any weighing of the various criteria. The argument of counsel for the Carpenters, endorsed by the other two, ran as follows. A review of the Board's section 91 jurisprudence will not disclose any decision where the Board has altered a work assignment made by an employer to members of a trade union with which the employer has a collective agreement, when the trade union seeking the work assignment does not. That empirical view of the Board's decisions, counsel suggests, shows that a work assignment complaint under section 91 cannot succeed where the trade union holding the assignment has a collective agreement with the employer and the trade union claiming the work does not. That makes sense, according to counsel, because an employer who is ordered by the Board to assign work to a trade union with which it has no collective agreement can carry out the order only in one of two ways. The first is to seek employees directly from the trade union and the second is to subcontract the work to another employer. Because of the prevalence of union hiring halls in the construction industry and their manner of operation, the first alternative likely would result in the employer having to sign a collective agreement. That would make the Board's work assignment an order that the employer enter into a collective bargaining relationship. The second alternative would require the employer

o enter into a contractual relationship with another employer who has a collective agreement with the successful trade union. Counsel argues that the Board does not have jurisdiction to direct an employer to enter into a contractual relationship with another employer in order to benefit a particular trade union or class of employees.

25. The argument of those three parties poses the difficult question of whether, in order for a trade union to have legitimate claim to particular work, must its claim to jurisdiction over that work be founded in collective bargaining rights expressed in the collective agreement covering the work with the employer who is or was assigning the work to persons in another trade union which has a collective agreement covering the work with that employer. None of those three parties referred the Board to a decision in which the Board was persuaded to uphold or alter the employer's assignment on the sole ground that the successful trade union had a collective agreement with the employer and the unsuccessful one did not. Nor did they rely on particular Board decisions to support their argument that an empirical view of the Board's decisions shows that a work assignment complaint under section 91 cannot succeed where the trade union holding the assignment has a collective agreement with the employer and the trade union claiming the work does not. Even if none of the Board's assignments have been decided on the grounds argued by the Carpenters, the Labourers and Pigott, they may still be correct that none of the Board's decisions have awarded disputed work to a trade union not having a collective agreement with the employer when the employer had assigned the work to a trade union which did have one. In the earlier cases, that well could have been the result of the Board's weighing of the various criteria which it considers when adjudicating work assignment disputes. Analytically, that is not quite the same as saying that not having a collective agreement with the employer who is assigning the work is fatal to a work assignment claim if another trade union claiming the work has one.

26. It is not surprising then, that no cases were cited to the Board which focus quite as starkly as the arguments and facts of this case do, on the issue of whether a trade union can successfully press a work assignment claim under section 91 of the Act if it does not have a collective agreement covering the work with the employer who is assigning the work if another trade union claiming the work has one. Even in *Brunswick Drywall*, *supra*, on which complainants' counsel relied in defence of this argument, the Board does not address the issue that the trade union to which the Board awarded the work did not have a collective agreement covering the work with the employer, while the one claiming the work did. It would appear that none of the parties in that case advanced the argument which faces this panel of the Board. In that respect, it is worthy of note that, of the nine other Board decisions on which counsel for the complainants' relied for a variety of purposes, five of them are cases where the section 91 complaint was triggered by a work claim of a trade union which did not have a collective agreement with the employer who had assigned the work. That did not deter the Board from entertaining all five complaints under section 91, as it is now, and deciding the assignment according to the balancing of various criteria. It would be surprising not to find many similar examples sprinkled throughout the same body of jurisprudence as the Carpenters, the Labourers and Pigott are relying on. In fact, in recent years, when jurisdiction complaints have been initiated as a defence to a grievance referral under section 124 of the Act, it is not unusual for the trade union claiming the work by means of its grievance to have no collective agreement with the employer who actually made the work assignment.

27. The fact that Pigott is bound together with the Carpenters and the Labourers to collective agreements which are the products of a collective bargaining relationship enforceable by statute and has no similar collective bargaining obligation to the complainants, raises a rebuttable presumption in favour of upholding Pigott's assignment to its carpenters and construction labourers who are members of the Carpenters and the Labourers. Pigott's collective agreements with the Carpenters and the Labourers give them exclusive bargaining rights for Pigott's carpenters and

construction labourers and impose a legal obligation on Pigott to recognize those rights. That obligation would require Pigott to recognize, at the very least, that the Carpenters has some claim to the work listed in Schedule "A" of the carpenters provincial agreement and that the work listed arguably includes the work in dispute herein. While the claim in Schedule "A" does not express any better claim than that described in the complainants' collective agreements, the claim in Schedule "A" has the strength of being founded in collective bargaining rights. The labourers provincial agreement does not express an independent claim to the work in dispute. Pigott's obligation to the Labourers under clause 2.06 of that agreement is to assign to members of the Labourers the work of "tending carpenters". Therefore, if Pigott assigns the work in dispute to the Carpenters, it must also assign to the Labourers the associated "handling and conveying of materials". While the Labourers' claim is dependent upon the Carpenters' claim, it too has the strength of being founded in its collective bargaining rights for Pigott's construction labourers.

28. Pigott has no comparable obligation to the IBEW and the UA. How, then, can those unions legitimately claim that Pigott was obliged to assign the work in dispute to IBEW electricians and UA plumbers? If there is an answer to that question that is favourable to the complainants, it is to be found in the construction industry context in which the dispute arises.

29. The work in dispute is in the industrial, commercial and institutional ("ICI") sector of the construction industry in Metropolitan Toronto and nearby municipalities, as were all 17 hospital construction projects in evidence herein. The unionized part of the ICI sector of the construction industry in Ontario has been subject to the province-wide bargaining scheme of the Act since 1978. Pigott, the Carpenters, the Labourers, the IBEW and the UA are parties to whom the province-wide bargaining scheme applies. The collective agreements binding upon Pigott, the Carpenters and the Labourers are products of bargaining under that scheme. While the IBEW and the UA are not bound to collective agreements binding on Pigott, they are bound to the electricians provincial agreement and the plumbers provincial agreement together with electrical and mechanical contractors for whose electricians and plumbers the IBEW and the UA hold bargaining rights in the ICI sector. When Pigott and the other general contractors on 16 of the 17 hospital construction projects in evidence decided to subcontract the work which included the installing of the patient service modules, they subcontracted the work to electrical or mechanical contractors bound to the electricians and plumbers provincial agreements. As a result of those subcontracts, the patient service modules were installed by IBEW electricians and UA plumbers under their respective provincial agreements. Where the patient service modules were to house both electrical and medical gas services, they were installed by crews composed of equal numbers of IBEW electricians and UA plumbers, except on Pigott's Scarborough Centenary Hospital project where they were installed by IBEW electricians. Pigott was not obliged, and there is no evidence the general contractors on the other hospital projects were obliged, once having decided to perform the work, to let it to a subcontractor who would have the work performed by persons belonging to those two unions. The Carpenters union was aware of those subcontracts and the resulting work assignments to IBEW electricians and UA plumbers, but did not contest any of them. So, whatever claim to the work in dispute the Carpenters union has under Schedule "A" and clause 19.01 of its provincial agreement or the collective agreements which were in force prior to province-wide bargaining in 1978, it did not rely on those provisions to claim the work by way of grievances or work assignment complaints.

30. Having work performed by way of subcontract to trade contractors like the electrical and mechanical contractors on the hospital projects, is fairly typical of building construction in the unionized part of the ICI sector of the industry. That practice results largely from the historical development of a division of labour in the construction industry based on the principle of operational specialization, particularly in the United States and Canada.

31. The effect of the division of labour by trade or craft is clearly visible in the international unions which represent construction tradesmen in Canada and the United States. Approximately 20 of these unions joined together to form the Building and Construction Trades Department of the AFL-CIO. They are known as the building trades unions. Some 13 of these building trades unions have a presence in construction in Ontario. They also are the unions who hold the exclusive bargaining rights for their trades under the province-wide bargaining scheme in the ICI sector. Historically each building trades union has sought to organize all of the employees in its trade rather than all of the employees of an employer, as in the industrial union model. Each claims to itself exclusive jurisdiction in the construction industry for its trade and the work performed by the trade. That is one means by which each of these unions seeks to assure that its members will retain a share of the available work in the industry. These are institutional claims and, while the building trades unions will seek to enforce their claims through protective provisions in their collective agreements, they have used whatever lawful means which they thought would be effective in the particular circumstances. A classic work jurisdiction dispute results when a union perceives "its work" being done by persons other than its members and seeks to change that circumstance by demanding that it be done by its members. Where, as here, it occurs in the unionized ICI sector of the industry, it is a struggle between two or more of the building trades unions over which union's members will do the work.

32. One of the effects of operational specialization on building construction is visible in the way employers have organized themselves to perform construction work. Typically there are general contractors and trade contractors. A general contractor usually deals directly with the purchaser of construction and takes charge of an entire project. The general contractor may employ bricklayers, carpenters, construction labourers, cement masons (cement finishers), operating engineers and rodmen, but may, and frequently does choose to perform only a limited amount of work with its own employees. Instead it will choose to subcontract packages of work to subcontractors, many of whom will limit the work they take to that which is performed by one or two trades. These are the trade contractors and their specialization is defined by the trades which they employ and, in the unionized part of the industry, by the trade unions representing those trades. In the unionized ICI sector in Ontario, an electrical contractor employing only electricians represented by the IBEW and a mechanical contractor employing only plumbers and steamfitters represented by the UA would be common examples of trade contractors. 16 of the 17 hospital projects in evidence in this proceeding are examples of general contractors subcontracting packages of electrical and mechanical work to electrical and mechanical trade contractors.

33. One of the obvious consequences of such practices is that trade contractors are largely dependent upon general contractors continuing their subcontracting practices. So are the trade unions which represent those trades dependent on the practices continuing for there to be work opportunities for their members, unless, of course, the general contractor employs them directly to do the work. Where, as has happened here, the general contractor assigns work directly to a trade different from the one which would have performed it had the general contractor subcontracted the work, it poses a difficult dilemma for the trade union whose members lose the work opportunity. For example, in the instant case, the real complaint of the IBEW and the UA is with Pigott (and the Carpenters and the Labourers), but they have no collective agreements with Pigott and, therefore, no grievance and arbitration process available to them. The agreements binding on the IBEW and the UA are with electrical and mechanical contractors who likely share with the two unions their interest in retaining jurisdiction over the work in dispute. When Pigott disagreed with the complainants' claim to the work, they pursued the claim by filing this complaint under section 91 of the Act.

34. Work jurisdiction disputes are a perennial problem for the construction industry. Seen

from outside the industry, they appear to be senseless fights between members of the building trades family of unions about which union's members are to get a particular work assignment; or, to put it another way, about which union's members will be employed and which ones will be unemployed. But when such disputes are viewed in the context of the operational specialization prevalent of the construction industry, the claim of jurisdiction over a particular kind of work is but one of several mechanisms relied on by the building trades unions to protect their members' share of the available work. Protecting work jurisdiction claims is an integral part of the union security provisions in construction industry collective agreements. The closed shop hiring hall system and limiting the subcontracting of the claimed work to contractors with whom the union has a collective bargaining relationship complete the protection. This approach to job security might not be acceptable outside of the construction industry, but that is not reason to condemn its use in the industry. Those mechanisms both reflect and attempt to balance the economic and structural forces which operate in the construction industry.

35. This work jurisdiction dispute arises in the context of the unionized part of the ICI sector of the construction industry in Metropolitan Toronto and nearby municipalities. During the 13 years represented by the past practice evidence in this case, unionized contractors have been performing work in the sector and area with employees who are represented in collective bargaining by the building trades unions. Since January 1978, those relationships have been regulated by the province-wide bargaining scheme. Under that scheme, each building trades union can represent only employees in the trade for which it has been designated. It is in this context that the work in dispute has been performed on hospital projects exclusively by trade contractors under subcontract from general contractors, but for the single exception on the Credit Valley Hospital where the general contractor performed it with its own forces, members of the Carpenters. But for that exception, the work has been performed exclusively by IBEW electricians and UA plumbers employed by the trade contractors. That is the overwhelming past practice and clearly it is the product of the various contractor and trade union players in this segment of the construction industry playing out to the fullest extent the operational specialization characteristic of the industry.

36. Pigott previously has not assigned the work to the Carpenters and Labourers. Nor has it employed IBEW electricians or UA plumbers to perform the work. It has subcontracted the work to contractors who in turn have assigned it to IBEW electricians and UA plumbers. To this extent at least, Pigott has contributed to the area past practice of the work being performed exclusively by IBEW electricians and UA plumbers with the single exception of the Credit Valley Hospital project.

37. The letting of the work on the other projects to subcontractors and assignment of the work to the IBEW and the UA, was not contested by the Carpenters and Labourers. Clearly, there has been an acceptance of that subcontracting and of those assignments. With it there has developed a consistent and long standing practice of the IBEW and the UA installing patient service modules in hospitals where the modules will contain electrical and medical gas devices. Now, after 13 years of their members installing patient service modules on all but one of the hospital construction projects in Metropolitan Toronto and nearby municipalities, as a result of Pigott's assignment of that work to the Carpenters on St. Joseph's Hospital, the IBEW and the UA see their work being done by members of other trade unions. To them, that is a direct challenge to the stability of what they believe is their established work jurisdiction.

38. If the Carpenters, the Labourers and Pigott are correct and the IBEW and the UA cannot make a successful claim for the work in dispute under section 91 because they lack collective agreements with Pigott, there may well be no other lawful recourse open for the IBEW and the UA to establish that their consistent and long standing practice of installing patient service mod-

ules gives them jurisdiction over that work on hospital construction projects in the unionized sector of the construction industry in Metropolitan Toronto and nearby municipalities. From a practical point of view, they cannot gain jurisdiction by obtaining bargaining rights for Pigott's employees since it does not employ electricians and plumbers and the IBEW and the UA are prohibited by statute from representing any other trades in the ICI sector of the construction industry. If it is intended that the Board's jurisdiction under section 91 be used to fashion remedies which will lessen work assignment disputes in the construction industry, the result argued for by the Carpenters, the Labourers and Pigott would be counter to that objective. Furthermore, the result suggests that the Board would exercise its discretion under subsection 91(1) to refuse to inquire into a complaint if the trade union claiming the work in dispute does not have a collective agreement covering the work with the employer who is or was assigning it and the trade union to which it has been assigned does. From even the small sampling of the Board's jurisprudence on work assignment complaints relied on by the complainants, it would appear that the Board has not taken that approach. It would appear also that unionized employers in the construction industry and the trade unions which represent their employees either have accepted that a trade union can bring a work assignment complaint in those circumstances, or they have not persuaded the Board in any reported decision to refuse to inquire into such work assignment complaints. Thus, to this panel of the Board, it appears that, prior to this complaint, the Board has not ever refused to consider whether any of the other usual criteria were so compelling as to override the lack of a bargaining relationship between the union claiming the work and the employer who was assigning it.

39. As noted already, the opposing claims for the work in dispute in this complaint pose the difficult question of whether the Board would direct an assignment which would have the effect of taking work away from persons in the trade union with a collective agreement covering the work, to which the employer who is or was assigning the work is bound, and give it to persons in a trade union which is not bound to a collective agreement with the employer, on the basis of a consistent and long standing practice of that union's members performing that work. The Board has considered it appropriate to set out at some length its views in that regard in deference to the importance of the issue and the attention given to it by the parties. Having done so, however, in the final analysis there is a further element of this complaint which compels the majority of the panel to not decide the question in this case. That element is clause 402 of the electricians provincial agreement. The clause, in the majority's view, makes this complaint a request that the Board direct Pigott to subcontract the work to a third party who will assign the work to a crew composed of equal numbers of IBEW electricians and UA plumbers. This is evident from looking at the effect of directing Pigott to assign the work to such a composite crew. Were the Board to make that direction, Pigott should have the same choices available to it when complying with the direction as it had when it first received its contract from St. Joseph's; that is, to perform the installation of the patient service modules with its own forces or subcontract the work. Should Pigott choose to assign the work to a crew of its own employees composed of equal numbers of IBEW electricians and UA plumbers, it would be unable to do so because of the restrictive hiring practice of the IBEW, one of the joint complainants. Instead, Pigott would have to engage in some form of subcontracting.

40. Thus, while the complainants have jointly asked the Board to direct Pigott to assign the work to a crew composed of equal numbers of IBEW electricians and UA plumbers, the practical effect of the IBEW's hiring restriction is to make their complaint a request that the Board direct Pigott to subcontract the work to contractors who will assign the work in the requested manner. In these circumstances, the Board is of the view that Pigott's assignment of the work in dispute should not be disturbed.

41. Accordingly, pursuant to the provisions of subsection 91(1) of the *Labour Relations Act*, the Board directs that Pigott Construction Limited continue to assign to carpenters in the

United Brotherhood of Carpenters and Joiners of America, Local 27 and to construction labourers in the Labourers' International Union of North America, Local 506, the transporting from a central storage area to the point of installation and installing patient service modules on the walls of patient rooms, including the fitting of face panels and final clean-up, on the St. Joseph's Hospital project.

DECISION OF BOARD MEMBER H. KOBRYN; April 10, 1990

1. The evidence presented to this Board shows that these patient modules have been installed in other hospitals in this area almost exclusively by a composite crew of equal numbers from IBEW Local 353 and the UA Local 46 as part of a subcontract. The subcontracts were let by the general contractor of the particular project to either an electrical contractor or to a mechanical contractor.

2. The only time the assignment of patient modules did not follow the past practice in this area was in this case and one other, where the architect for the project left the installation of patient modules in the general contractors section of the contract. In both instances when this happened the general contractor assigned the work to his own work force of carpenters and labourers. This disregard for past practice was what caused this jurisdictional dispute and the subsequent complaint.

3. Based on the evidence before this Board and using the language the parties understand, the work of the installation of patient modules should have been assigned to the unions making the complaint, which are the IBEW Local 353 and UA Local 46. The work shall be performed by a composite crew of equal numbers from both of the above named locals.

4. Further, should the general contractor, as the result of this decision, decide to do this work with its own work force, then the applicant unions are obliged to supply the members if and when requested.

5. Further, it is the function of this Board to determine the question as to the proper assignment of the work. It is *not* the function of this Board to determine who the employer of the employees will be once the decision on the proper assignment of the work has been determined by this Board.

2018-88-U; 2019-88-U; 3122-88-U United Steelworkers of America, Applicant v. **Plaza Fiberglas Manufacturing Limited** and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron, Respondents; United Steelworkers of America, Complainant v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron, Respondents; United Steelworkers of America, Complainant v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Ltd. and Sabina Citron, Respondents

Damages - Unfair Labour Practice - Board remaining seized with calculation of damages - Request by respondent employer for the panel to reconvene to clarify the relationship between an award under the *Employment Standards Act* and the Board's award of damages - Request premature

- Parties should try to work out quantum of compensation themselves before coming to the Board for assistance

BEFORE: *Patricia Hughes,* Vice-Chair, and Board Members *M. Rozenberg* and *K. Davies.*

APPEARANCES: *L. A. Richmond, C. M. Mitchell, M. Crnkovich* and *J. Perquin* for the applicant/complainant; *Michael Gordon, Paul Wearing, Thomas F. Stefanik, Mary Eberts* and *Mark Hemingway* for the respondents.

DECISION OF THE BOARD; April 11, 1990

1. The name of Mark Hemingway is added to the list of appearances on behalf of the respondents in these matters (see decisions dated February 23, 1990, as amended to add appearances by decision dated March 9, 1990).

2. The decisions in the above three cases were released February 23, 1990. Shortly afterwards, in a letter dated March 6, 1990, counsel for the respondents requested a re-attendance before the panel with respect to certain issues. Subsequently, counsel for the complainant filed submissions on the issues in dispute (letter dated March 9, 1990) and counsel for the respondents filed a reply to those submissions (letter dated March 28, 1990). We are satisfied that at this time it is appropriate to deal with these issues on the basis of the written submissions of counsel.

3. After the conclusion of the original hearing, but prior to the release of the decisions, counsel for the respondents sent to the Board certain correspondence and documents, asking that the panel consider them in reaching its decisions. In her decision on the three matters before her, concurred in by the other members of the panel, the chair of the panel explained that she did not take the correspondence into account in reaching her decision, indicating that "[m]y refusal to consider any matters brought to the panel's attention at this stage is not to be treated as a determination on the relevance of the matters or on the outcome of any dispute arising out of them. Rather, I am concerned that, the hearing having been completed, these proceedings may become even more protracted than they have been". (See decisions dated February 23, 1990.) She further commented that "[a] party is, of course, free to seek to raise what it considers relevant matters following the release of a decision". As is normal practice, the decision of February 23rd ended with the following paragraph: "The Board remains seized to deal with any matters arising out of the implementation of remedies or calculation of damages".

4. Two of the three issues raised by counsel in her letter of March 6th relate to the subject of the correspondence sent to the Board between the end of the hearing and release of the decisions by the Board. The complainant herein had brought proceedings against the respondents under the *Employment Standards Act* relating to certain of the events which had also been before the Board. Counsel points out that the material "has a clear bearing on one of the matters left to be worked out, namely the determination of the amount of the damages for individual employees . . . ." From her letter of March 28th, it appears that counsel's more specific concern is that "the appropriate relationship between its order or damages on a continuing basis and the Employment Standards order -- which presupposes a severance of the employment relationship -- is critical to any resolution of this matter". The second, related, issue raised in the March 6th letter "is the calculation of compensation for monetary loss" since "[i]t would assist in this process to have clarification of the Board's views on the interrelation, if any, between its proceedings and the Employment Standards Act proceedings and order".

5. Counsel for the complainant advised that the complainant was calculating the damages

it thought it was entitled to be paid and that in doing so, "it will take into account Employment Standards considerations", and then meet with the respondents to explain its calculations. Counsel took the position that the request of counsel for the respondents was premature.

6. In directing the payment of compensation, the chair of the panel, the other members concurring, related the payment to the "monetary losses arising reasonably out of the employer's, Citcor's and Mrs. Citron's violations of the Act" and further directed that "in determining the amounts payable, the parties are to apply the principle of mitigation of damages". The relationship between the Employment Standards award and the Board's award falls within those general principles which always have to be addressed by parties in determining compensation.

7. We agree that the request to decide the impact of the Employment Standards award is premature. The Board generally separates the issues of liability and quantum and did so in these cases. It found that the respondents had committed certain violations and directed certain remedies, but left to the parties to work out in the first instance the implementation of the remedies, particularly compensation. Once a party is found to be liable, quite often it is not necessary for the Board to deal with quantum because the parties are able to settle the matter between themselves. That is consistent with the general view that where the parties are able to settle matters to their own satisfaction, it is preferable that they do so. There has been no opportunity here for the parties to do so. The parties have not met to discuss the question of compensation; there is no evidence that there is any disagreement about the effect or role of the Employment Standards award among the parties. It is not entirely outside the realm of possibility that they are able to reach agreement on these matters. On the other hand, if they do not agree after making a serious attempt to determine compensation, there may be other aspects of the issue to be dealt with in addition to or instead of the relationship between the Employment Standards award and the Board's award of compensation. It would then be appropriate for the parties invoke the assistance of the Board.

8. The third issue raised by counsel for the respondents relates to the wording of the Notice to Employees which the respondents have been directed to post. Counsel points out that a certain portion of the Notice is not worded in the same way as is the remedy to which it refers. Counsel for the complainant submits that the Notice accurately reflects the decision and should not be amended. The Notice, of course, is part of the remedy, it does not confer any remedies. Any dispute arising about the scope of a remedy because there may be a difference in wording between the decision and the Notice should be short-lived and resolved in favour of the wording in the decision. Preferably, there should not be a difference which could give rise to a dispute. We agree that the relevant portion of the Notice is less precise than the actual remedy granted and we amend it accordingly. Therefore, that portion of the Notice to Employees, attached as an Appendix to the decisions dated February 23rd, which reads as follows:

> We will compensate the United Steelworkers of America ("the union" for its monetary losses resulting from our violations of the Act.

is amended to read as follows:

> Plaza will compensate the United Steelworkers of America ("the union") for its reasonable negotiating costs arising out of its violation of the Act.

9. The directions of the decisions of February 23rd relating to the signing and posting of the Notice to Employees apply to the Notice as amended above.

Appendix

Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS BEFORE THE BOARD. THE BOARD FOUND THAT PLAZA FIBERGLAS MANUFACTURING LTD. AND PLAZA ELECTRO-PLATING LTD. ("PLAZA") VIOLATED SECTIONS 15, 64 AND 75 OF THE LABOUR RELATIONS ACT AND CITCOR MANUFACTURING LTD. ("CITCOR") AND SABINA CITRON VIOLATED SECTION 64 OF THE ACT, AND HAS ORDERED US TO INFORM THE AFFECTED EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

- WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.
- WE WILL CEASE AND DESIST FROM VIOLATING THE ACT.
- WE WILL FULLY COMPENSATE EMPLOYEES WHO LOST WAGES AND BENEFITS BECAUSE OF THE ILLEGAL LOCK-OUT.
- PLAZA WILL COMPENSATE THE UNITED STEELWORKERS OF AMERICA ("THE UNION") FOR ITS REASONABLE NEGOTIATING COSTS ARISING OUT OF ITS VIOLATION OF THE ACT.

PLAZA WILL CONVENE FORTHWITH BARGAINING MEETINGS BETWEEN ITSELF AND THE UNION WILL BARGAIN IN GOOD FAITH AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT WITH THE UNION.

PLAZA WILL FORTHWITH PROVIDE THE UNION WITH A LIST OF THE NAMES AND ADDRESSES OF EMPLOYEES IN THE BARGAINING UNIT AS OF NOVEMBER 14, 1988 AND WILL ADVISE THE UNION OF CHANGES OF ADDRESSES WHEN SO ADVISED UNTIL A COLLECTIVE AGREEMENT IS SIGNED.

PLAZA FIBERGLAS MANUFACTURING LTD. AND PLAZA ELECTRO-PLATING LTD.

PER_____

CITCOR MANUFACTURING LTD.

PER_____

SABINA CITRON

PER_____

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 11TH **day of** APRIL , 19 90 .

1590 LR02 (1/88)

2527-89-R Joao Pombinho, Applicant v. Local 444 C.A.W., Respondent

Petition - Termination - Termination applicant believed employer's intention to increase fishing quotas if fishing boat crew members got rid of union - Applicant used this to persuade crew members to sign a termination petition - Board not persuaded petition voluntary - Application dismissed

BEFORE: *Robert D. Howe,* Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock.*

APPEARANCES: *L. Suzanne Balzer* and *Joao Pombinho* for the applicant; *L. A. MacLean* and *Mike Darnell* for the respondent.

DECISION OF THE BOARD; April 11, 1990

1. This is an application under section 57(1) of the *Labour Relations Act* for a declaration that the respondent (which was formerly the Great Lakes Fishermen and Allied Workers' Union) no longer represents the employees of C. P. Fisheries Ltd. (the "Company") for which it is the bargaining agent.

2. The respondent does not contest the timeliness of the application, and it appears from the documentation filed with the Board in respect of this matter that the application is timely.

3. The Board finds that the respondent is currently the bargaining agent for a bargaining unit comprised of all employees of the Company engaged in fishing on Lake Erie, save and except boat captain, those above the rank of boat captain, and office and clerical staff.

4. Having regard to the agreement of the parties, the Board further finds that the applicant is an employee within the bargaining unit. It is common ground between the parties that there were six employees in the bargaining unit at the time the application was made. The applicant, through his counsel, has filed with the Board in a timely fashion a statement of desire (the "petition") by which four of those six employees purport to indicate that they no longer wish to be represented by the respondent (also referred to in this decision as the "Union", for ease of exposition).

5. During the course of the hearing of this matter on March 22, 1990, the Board heard testimony from three witnesses: the applicant and Francesco Floreno, who were called by applicant's counsel, and Joao Vidinha, who was called by respondent's counsel. In making the findings of fact set forth in this decision, we have carefully considered all of that oral evidence, as well as the documentary evidence that has been placed before us. Since we found Mr. Vidinha's testimony to be somewhat more reliable than that of the applicant and Mr. Floreno, we have generally relied upon his testimony in resolving conflicts in the evidence.

6. Section 57(3) of the Act provides as follows:

> Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

7. The various principles, considerations, and concerns which the Board generally takes

into account in determining whether or not an applicant has satisfied the onus of establishing the voluntariness of a termination petition are well established in the Board's jurisprudence. See, for example, *Johnson Matthey Limited*, [1987] OLRB Rep. Apr. 519; *Dynasty Inn*, [1986] OLRB Rep. March 326; *Crothall Services Limited*, [1984] OLRB Rep. Jan. 22; *Westinghouse Canada Inc.*, [1982] OLRB Rep. July 1098; *Charterways Transportation Limited*, [1981] OLRB Rep. Aug. 1108; *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759; and *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181. As noted in *Almag Aluminum Ltd.*, [1983] OLRB Rep. Nov. 1779, at paragraph 15, "the Board has consistently interpreted the word 'voluntary' in section 57(3) to mean that the petition is free of actual or perceived employer influence and that employees who sign a petition are not motivated by a perceived threat to their job security or by concern that failure to sign would be communicated to the employer or could result in reprisals." If employees are motivated to sign a petition by such concerns, or by an expectation that they will be financially rewarded by their employer for doing so, the petition will not be "voluntary" within the meaning of section 57(3).

8. Having duly considered all of the evidence and the submissions of counsel, we have concluded that the applicant has not met the onus of establishing on the balance of probabilities that the petition represents a voluntary expression of the true wishes of its signatories. Although the petition was prepared by applicant's counsel and signed by the applicant and three other bargaining unit employees in counsel's office, it is clear that what motivated them to sign it was the belief that if they "got rid of the union", the Company would increase the fishing quotas available to them and thereby substantially enhance their potential earnings.

9. As indicated in *Peralta Foods*, [1987] OLRB Rep. Sept. 1162, which was entered as Exhibit 2 in these proceedings on the agreement of the parties, the owners of fishing licences are able to transfer the quotas on the licences from one vessel to another, thereby increasing or decreasing the income which crew members are able to earn. At all times material to this application, the applicant and the other signers of the petition were of the view that since the Union came in, their incomes have decreased substantially as a result of the Company, through Vito Peralta, making only one quota available to them, instead of the two quotas which they were permitted to fish in the previous year. In this regard it was the applicant's evidence that his income from fishing was almost $30,000 in the year before the Union came in, and that it fell to $13,000 the next year, rising only to $18,000 and $20,800 in the ensuing two years.

10. As noted in paragraph 4 of *Peralta Foods*, *supra*, Mr. Peralta directed, managed, and controlled the fishing company (538391 Ontario Limited c.o.b. as Peralta Foods - Ilda C) which was the corporate respondent in that case. The applicant testified in the instant case that Mr. Peralta is also a 50% owner of the Mummery Bros., which is the boat on which the applicant and the other five employees fish. He further testified that Mr. Peralta has seven quotas and only two boats. It is the applicant's belief that if the crew of the Mummery Bros. eliminate the Union, Mr. Peralta will give an additional quota to that boat, thereby enabling them to earn substantially more income. Although the applicant denied doing so, we accept the evidence of Mr. Vidinha that in October of 1989, while discussing the desirability of decertifying the Union, the applicant told him that if they signed a paper against the Union, they would get more fish and would make $40,000. When Mr. Vidinha asked the applicant how he knew that, the applicant replied that Mr. Floreno, who is another deckhand on the boat, told him that Mr. Peralta had indicated that if they signed against the Union they would get more fish.

11. It is unnecessary for purposes of this decision to determine whether or not Mr. Peralta actually made any such statement to Mr. Francesco. It is also unnecessary to determine whether or not Mr. Francesco told the applicant that Mr. Peralta had done so. What is significant for purposes

of this decision is the fact that the applicant believed that to be Mr. Peralta's expressed intention, and used it in attempting to persuade crew members to sign against the Union. (Although the evidence adduced before us only directly establishes that the applicant made that statement to Mr. Vidinha, it is highly probable that he made similar statements to other employees in attempting to gain support for terminating the Union's bargaining rights.) It is also clear from the evidence that the applicant's motivation for obtaining employees' signatures on the petition and filing this application was his belief that he and his fellow crew members would be financially rewarded by Mr. Peralta, by means of a quota transfer, for returning the boat to its previous non-union status. Moreover, it was certainly not unreasonable for the applicant and other employees to believe that Mr. Peralta would be prepared to reassign quotas on the basis of a boat's union or non-union status, as it was common knowledge among the area fishermen that Mr. Peralta was strongly opposed to the Union, and that he (and Peralta Foods) had been ordered by the Board to pay over $100,000 in compensation to crew members after the Board found that he had, among other things, removed fishing quotas from the Ilda C and laid off its captain and crew to punish them for having joined the Union (see *Peralta Foods*, *supra*).

12. For the foregoing reasons, we are not satisfied that not less than forty-five per cent of the employees in the aforementioned bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent. Accordingly, this application is hereby dismissed.

2963-89-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Procon Developments Ltd.**, Respondent

Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Application for certification relating to "white area" - Board following its usual practice of describing the unit in reference to the township in which the project is located and the townships adjacent thereto - Employer requesting hearing to make representations on numerous matters - Hearing not necessary - Certificate issuing

BEFORE: *Louisa M. Davie,* Vice-Chair, and Board Members *W. Gibson* and *K. Davies.*

DECISION OF THE BOARD; April 2, 1990

1. In this application for certification the applicant filed eight combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are counter-signed and indicate that a payment of $1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, a list of employees containing thirteen names on Schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. Each of the eight cards filed corresponds to the names on the list of employees filed.

3. The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059,

1081 and 1089 are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.

4. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.

5. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.

6. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

7. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(*e*) shall be brought by either,
>
> (a) an employee bargaining agency; or
>
> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

8. In its application for certification, the applicant describes the unit of employees of the respondent which it claims to be appropriate for collective bargaining in the following manner:

> all construction labourers, cement finishers and waterproofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers, cement finishers, waterproofers and formsetters in the employ of the respondent in all other sectors of the construction industry in the Township of North Himsworth, Township of Chisholm, Township of Nipissing and surrounding township of Machar, save and except non-working foremen and persons above that rank.

9. The respondent employer describes the appropriate bargaining unit in the following terms:

> construction labourers utilized for winter condition for one project only - employed only at conc. 4 & 5, South Himsworth, District of Parry Sound.

10. By letter dated March 20, 1990, counsel for the applicant wrote to the Board as follows:

> We are in receipt of your March 16th, 1990, letter wherein the Respondent's reply to our Application for Certification is enclosed. We agree with the Respondent, wherein at paragraph 5 of the Reply, that the job site is at Himsworth South, consequently we amend our bargaining unit description to read Himsworth South and surrounding townships, rather than Himsworth North and surrounding townships.

11. We note that North Himsworth falls within Board Area 16 which encompasses that area which lies within a radius of thirty-three kilometres (approximately 20 miles) of North Bay Post Office. Had the project been in North Himsworth the Board would have reposted the application to conform with the new and substantially altered geographic description of the bargaining unit which would then have been Board Area 16. South Himsworth however, falls within one of the "white areas" and does not fall within a defined Board Area. In cases where an application for certification relates to a "white area" the Board's usual and normal practice is to describe the bargaining unit in reference to the township in which the project is located and the townships adjacent thereto. The Townships of Chisholm, Nipissing and Machar referred to in the application are not adjacent to North Himsworth but are adjacent to South Himsworth. In addition, the Townships of North Himsworth, Ballantyne and Laurier are also adjacent to South Himsworth. We note that in its reply the respondent concurs that the project is located in South Himsworth and states "Procon Developments is *not* working in North Himsworth". As the respondent admits it has no employees in North Himsworth and is involved in only one project, and in view of the description of the bargaining unit proposed by the applicant (which corresponds to a typical "white area" bargaining unit) it appears self-evident that the employees whom the applicant seeks to organize were employed in South Himsworth. The applicant would hardly seek to obtain bargaining rights in a geographic area in which the respondent has by its own admission no employees. The respondent's reply indicates there are no other employees who could be affected by this application. Finally, we note that it is within the Board's discretion to determine what constitutes an appropriate geographic area subject only to the caveat that the appropriate unit must be defined by reference to a geographic area and may *not* be confined to a particular project by reason of section 119(1).

12. Having regard to all of the circumstances, in keeping with the Board's usual policy relating to applications for certification which do not relate to a defined Board area, and in the absence of any statement of material facts or submissions as to why the Board's usual practice in respect of applications for certification in the "white areas" ought not to be followed in this instance, we find, pursuant to section 144(1) of the Act that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all sectors in the Township of South Himsworth and the surrounding Townships of Chisholm, Nipissing, Machar, North Himsworth, Laurier and Ballantyne in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman constitute a unit of employees of the respondent appropriate for collective bargaining.

13. In paragraph 13 of its reply the respondent states as "other relevant statements":

- No employees in bargaining unit will be employed after March 31st as Procon Developments Ltd. is not actively engaged in the construction industry.
- Only 4 employees (approx.) will be retained after March 15th for a short time period.
- Due to contract problems between Carlisle Power Systems Ltd. & P.B. Rombough Ltd. Procon labour force was used as a stop gap measure.
- Procon Developments is *not* working in North Himsworth.

In paragraph 14(3) the respondent requests a hearing of the Board and states *inter alia*:

- not engaged actively in construction industry.
- no projects in geographical area stated by applicant.
- no labourers employed after March 31st, 1990.

14. The respondent states in its reply that the general nature of its business is "management services". In paragraph 3 of the reply it states that the specific nature of its business affected by the application is "site preparation". In paragraph 4 it acknowledges that the nature of the work performed by the employees in the bargaining unit consists of "manual labour for winter conditions & dewatering construction site".

15. In an application for certification to which the construction industry provisions of the Act apply, the Board need not hold a hearing (section 102(14)). Given the unique nature of the construction industry and the transitory nature of persons employed in the construction industry, the Board often disposes of applications for certification in the construction industry without a hearing. The reasons for this have been articulated in many decisions of the Board (see *Westdale Painting & Decorating Ltd.*, [1989] OLRB Rep. Sept. 984 for a recent example). Moreover, where a party requests a hearing of a certification application which relates to the construction industry, it must set out a concise statement of the material facts, the relief sought and its submissions (see section 97 of the Rules of Procedure). In this case, the respondent has identified three reasons why it requests a hearing. We have already addressed one of those reasons namely the one which deals with the appropriate geographic area. We find that we can deal with this application on the basis of the material before us and, pursuant to section 102(14) will dispose of this application without a hearing. The Board will grant a request to conduct a hearing if the hearing will serve some useful purpose. In view of the reply filed and the statements therein we are of the view that a hearing into this application will not serve any useful purpose and will unduly delay the certification application. In circumstances such as these labour relations delayed is indeed labour relations denied. (*Journal Publishing Co. of Ottawa Ltd. et al* v. *Ottawa Newspaper Guild, Local 205, OLRB et al.* March 31, 1977 (Ont. C.A.) unreported).

16. The respondent requests a hearing because it is "not engaged *actively* in [the] construction industry." Its description of the specific nature of its business affected by the application as "site preparation" and its description of the work performed by employees as "manual labour" and "dewatering construction site" however are clearly construction activities. (See section 1(1)(f)).

17. Where a person operates a business in the construction industry, even if that business is only a small part of the person's business activities, and the person employs "employees" within the meaning of section 117(b) of the Act to perform the work of that construction part of the business, a trade union is entitled to be certified pursuant to the construction industry provisions of the Act for the employees engaged in the construction part of the business. In this regard, we agree with the statements of the Board in *Ridsdale Steel Fabricators*, [1987] OLRB Rep. April 601 at paragraph 10 where it states:

> 10. Clauses (b) and (c) of section 117 of the *Labour Relations Act* define "employee" and "employer" in the construction industry as follows:
>
> > (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining unit with on-site employees;

> (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

> Nowhere in the Act is it stipulated that a person must operate a business that is engaged solely or even primarily in the construction industry in order for that person to be an employer in the construction industry. Nor has the Board required that a person's business be operated solely or primarily in the construction industry in order for that person to be an employer in the construction (see, *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 and the Board decisions cited therein at paragraph 10). Similarly, there is no requirement that an employee perform a majority or any of his work on a construction site in order to be an employee in the construction industry. It is sufficient for an employee to be "commonly associated in his work or bargaining with on-site employees". Consequently, it is not correct, in our view, to say that an employer engaged in construction and non-construction activities with the same work force cannot be an employer in the construction industry.

The fact that the respondent is not "actively" engaged in the construction industry therefore does not warrant the holding of a hearing and/or a dismissal of this application where, as here, the respondent admits in paragraphs 3 and 4 of its reply that, at the relevant time it was engaged in construction activities. The factual admissions contained in paragraphs 3 and 4 of the reply render it unnecessary to conduct a hearing to determine if the respondent is an employer within the construction industry. In its reply the respondent admits it is.

18. Finally, the fact that the construction work is performed on behalf of others, or that the project is of short duration or will soon be completed are irrelevant reasons and do not warrant that the Board conduct a hearing. An applicant's right to certification is determined on the basis of the membership support it demonstrates among the employees in the bargaining unit at work on the date of application. (See among others *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41).

19. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 10(3) of the *Labour Relations Act*, are deemed to be members of the applicant on March 14, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

> ..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.
>
> [emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 6 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construc-

tion industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

21. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the Township of South Himsworth and the surrounding Townships of Chisholm, Nipissing, Machar, North Himsworth, Laurier and Ballantyne, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1580-89-R International Union of Operating Engineers, Local 793, Applicant v. **Russell H. Stewart Construction Company Limited,** Respondent v. Group of Employees, Objectors

Certification - Evidence - Fraud - Petition - Practice and Procedure - Reconsideration - Employee seeking reconsideration of Board's decision certifying union on basis that application tainted by fraud - Assertion that another employee circulated a petition but never intended to file it with the Board - Further allegation that this employee was acting as an agent for the union with respect to his petition activity - Union making non-suit application and electing to call no evidence - Reconsideration application dismissed - Circulator of the petition was not an agent or an officer of the union - No evidence as to why petition was not filed - Evidence consistent with theory that employees change their minds concerning support for a union - Objecting employees bound by the actions of their representative after selecting person to represent their interests in opposing the union

BEFORE: *Ken Petryshen,* Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn.*

APPEARANCES: Bernard Fishbein, John Monti and *Alcino Silveira* for the applicant; *Henry Dinsdale* and *Robert Tout* for the respondent; *James E. Bowden* and *Randy Parks* for the objectors.

DECISION OF THE BOARD; April 3, 1990

1. By decision dated October 20, 1989 the Board (differently constituted) certified the applicant as the bargaining agent for all employees of Russell H. Stewart Construction Company Limited (hereinafter referred to as "the Company") in the Township of Manvers, save and except superintendents, persons above the rank of superintendent, and students employed during the school vacation period. The application was scheduled to be heard by the Board on October 20, 1989. On that day the applicant and the Company met with a Labour Relations Officer, reached agreement on all matters in dispute between them and further agreed to waive their right to a formal hearing in the matter. No petition opposing the certification of the applicant was filed in connection with this application prior to October 20, 1989 and no one appeared at the hearing representing the objecting employees.

2. Randy Parks is an employee in the bargaining unit. Subsequent to the certification of the applicant, Mr. Parks sought reconsideration of the Board's decision certifying the applicant. After an exchange of correspondence between the parties, the Board scheduled a hearing on January 12, 1990 before the present panel for the purpose of hearing submissions with respect to Mr.

Parks' request for reconsideration, as set forth in letters dated October 27 and November 2, 1989 from counsel for Mr. Parks. After entertaining the parties' submissions on January 12, 1990, the Board reserved its decision.

3. Mr. Parks' reconsideration request was based on two relatively distinct grounds. He alleged that the applicant utilized improper solicitation techniques in securing its membership evidence. At the hearing on January 12, 1990, counsel for Mr. Parks conceded that Mr. Parks did not exercise due diligence in investigating the matters and in placing these allegations before the Board. In addition, Mr. Parks alleged that the application was tainted by fraud. In support of this latter position, he asserted that Jack Kerr, an employee in the bargaining unit, circulated a petition prior to the terminal date but never intended to file the petition with the Board nor to appear at the October 20, 1989 hearing. Mr. Parks also alleges that Mr. Kerr was acting as "agent" for the applicant with respect to his petition activity.

4. In a decision dated January 29, 1990 the Board decided that it would not entertain Mr. Parks' allegations concerning the applicant's conduct in obtaining its membership evidence since the Board was satisfied that these allegations were made in an untimely manner. In this decision, the Board (H. Kobryn dissenting) also determined that a hearing would be held on February 16, 1990 in order to give Mr. Parks the opportunity to call evidence to support the allegations concerning Mr. Kerr's petition conduct. In the majority's view, these allegations suggested a serious abuse of the Board's process, which might constitute fraud.

5. At the hearing on February 16, 1990 counsel for Mr. Parks called three witnesses to give evidence, namely Mr. W. McMillan, Mr. R. Bennett and Mr. Parks, all employees within the bargaining unit. The Company did not call any oral evidence. When the applicant was given the opportunity to present evidence, counsel made a non-suit motion and argued that the applicant should not be put to its election. After considering the parties' submissions on this issue, the Board (H. Kobryn dissenting) put the applicant to its election. The applicant elected not to call any evidence and the Board proceeded to hear final submissions. After hearing submissions from counsel for Mr. Parks and counsel for the Company and after recessing to consider the matter, the Board ruled orally at the hearing that the facts did not support the allegations made by Mr. Parks and that accordingly the reconsideration request and the application under section 58 of the Act were dismissed.

6. The applicant filed its application for a bargaining unit of the Company's employees on September 26, 1989 and the Registrar fixed October 10, 1989 as the terminal date. The Company operates a quarry. A significant number of employees do not leave the site during the work week. They use sleeping accommodation on site supplied by the Company. Mr. Kerr was the employee who first made contact with the applicant. He talked to some employees concerning their interest in having a union represent them and advised them that a meeting of employees would be arranged to discuss unionization. The applicant held an organizing meeting on September 25, 1989 in a restaurant attended by three officials of the applicant. Mr. Kerr attended the meeting but did not play a role which distinguished him from any other bargaining unit employee. On a day shortly after the organizing meeting, Mr. Kerr woke an employee and took him outside the gate to meet certain union officials. Mr. Kerr did not sign as a collector on any of the membership cards filed by the applicant in support of this application.

7. The Company held a meeting in the Recreation Room next to the cook trailer at approximately 6:00 p.m. on October 2, 1989. Mr. R. Tout, general superintendent, was in charge of the meeting which appeared to be called for the purpose of discussing unionization of the Company's workforce. In a five-page letter addressed to the Company's employees and circulated at the

meeting, the Company advised: "We are considering NEW SALARY INCREASE AND BENEFIT PACKAGE and will be announcing our decision in the very near future". Shortly after the meeting, employees did receive a wage increase effective October 2, 1989. One of the witnesses called by Mr. Parks testified in cross-examination that a lot of employees began re-thinking the question of unionization after the Company meeting.

8. After discussions with counsel, Mr. Parks decided he should not be the one to circulate a petition opposing the applicant. Mr. Parks contacted a fellow employee by telephone who volunteered to find someone to circulate the petition. Mr. Parks was unaware of how or why Mr. Kerr was selected to circulate the petition. Mr. Kerr did advise Mr. Parks the day after the Notice to Employees was posted on October 4, 1989 that he would circulate the petition. It was approximately at this time that Mr. Parks found out that Mr. Kerr had played a role in assisting the applicant in its organizing efforts. Mr. Kerr did obtain names on a petition opposing the certification of the applicant. He also obtained $500.00 from Mr. Parks and pledges of financial support from other employees in order to assist in hiring a lawyer. Mr. Kerr repaid the $500.00 after the hearing. As noted earlier, a petition was not filed with the Board prior to the October 20, 1989 hearing and no one appeared at the hearing on behalf of the objecting employees. Mr. Kerr did not attend work on October 20, 1989.

9. Mr. Kerr was not an officer or official of the applicant during the relevant time frame. Nor was he, in our view, an agent of the applicant. Mr. Kerr was an employee in the bargaining unit who played what we would characterize as a relatively minor role in the applicant's organizing campaign. He made the initial contact with the applicant, discussed the matter of unionization with some employees and introduced at least one employee to trade union officials. Mr. Kerr did not act as a collector as disclosed by the membership evidence filed with the Board. Subsequent to the Company meeting of October 2, 1989 and the posting of the Notice to Employees, Mr. Kerr became involved in circulating a petition in opposition to the applicant. The Board's experience is that employees, for various reasons, may change their minds about unionization during the course of an organizing campaign and while an application for certification is being processed by the Board. Employees may initially favour a trade union, oppose it and then support it again within a very short time frame. There is nothing in the evidence which suggests that Mr. Kerr was anything but a supporter, albeit a somewhat active one initially, who changed his mind about supporting the applicant and was prepared to circulate a petition. It appears that after the Company meeting on October 2, 1989 and the wage increase effective that date, a number of employees began to reconsider their support for the applicant. There is no evidence before us concerning why Mr. Kerr did not file the petition with the Board or appear at the hearing. Such conduct is consistent with Mr. Kerr's simply changing his mind again. These are not the circumstances in which we would conclude that an evidentiary onus shifted to the applicant to explain why Mr. Kerr acted the way he did.

10. In selecting Mr. Kerr to represent their interests in opposing the trade union, the objecting employees are bound by the actions of their representative. The Board was not satisfied that the evidence before us disclosed an abuse of the Board's process or fraud on the part of Mr. Kerr or the applicant.

0821-88-R Tactix Construction Limited, Applicant v. United Brotherhood of Carpenters & Joiners of America, Local 27, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Construction Industry - Related Employer - Five corporations carrying on related activities - Whether Board should exercise its discretion to treat them as one employer - One of five corporations evincing willingness to revive other four dormant corporations to defeat bargaining rights of Carpenters Union with respect to the residential sector - Board making one employer declaration to protect those bargaining rights from erosion

BEFORE: *N. B. Satterfield,* Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn.*

APPEARANCES: *Nancy Courtney* and *Andy Senyi* for the applicant; *David McKee* and *Frank D'Abbondanza* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; April 25, 1990

1. Tactix Construction Limited applied under subsection 1(4) of the *Labour Relations Act* for a declaration that it, together with three other corporations, Mark/Barry Holdings Ltd., Stash Investments Inc. and Danand Investments Limited be treated as constituting one employer for purposes of the Act. For ease of reference, the Board will refer to the four corporations as ("Tactix", "Mark/Barry", "Stash" and "Danand"). Tactix later sought to withdraw its application. The Board refused Tactix' request and allowed the request of the United Brotherhood of Carpenters and Joiners of America, Local 27 to pursue an independent claim for relief made in its reply to the application. The Board's reasons for refusing Tactix' request and allowing the request of Local 27 are set out in the Board's decision which issued August 21, 1989 [reported at [1989] OLRB Rep. Aug. 903]. Local 27's request for relief included a request that those same four corporations, together with Jilsen Investments Inc., be treated as constituting one employer for purposes of the Act. This decision deals with the merits of that request.

2. It is useful to an understanding of Local 27's claim for relief to summarize briefly the chronology of events leading up to the Board's decision issuing on August 21, 1989. That decision sets out the chronology in full. Local 27 was certified on February 18, 1988 to represent Tactix' carpenters employed in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Board's geographic area #8. That geographic area includes Metropolitan Toronto and adjacent municipalities. On the same date, in a separate application which was heard together with Local 27's application for certification, the Board also certified the Labourers' International Union of North America, Local 506 for Tactix' construction labourers employed in the ICI sector and in all other sectors in Board area #8. Tactix was represented by experienced labour relations counsel at the hearing into the two applications and had agreed together with Local 27 and Local 506 to the descriptions of the unit of employees in each application which the parties considered to be appropriate for collective bargaining purposes. The Board accepted the agreement of the parties. Since both applications had been made under subsection 144(1) of the Act, two certificates were issued in each application pursuant to subsection 144(2) of the Act, one for the ICI sector and the other for all other sectors in Board area #8. Some four months later, Tactix applied to have the Board reconsider its February 18th decision and revoke Local 27's certificate for Tactix' carpenters in all other sectors of the construction industry in Board area #8. The application was made through Tactix' solicitors, a different firm than the one which represented it at the certification hearing. No request was made to revoke the similar certificate of Local 506. The application for a declaration

under subsection 1(4) of the Act was made in support of and at the same time as the request for reconsideration. Labourers' International Union of North America, Local 183 also requested that the Board reconsider its decision and revoke the certificate to Local 27 and intervened in the application under subsection 1(4).

3. The basis of their applications was the claim that Tactix was bound to a collective agreement between the Metropolitan Toronto Apartment Builders Association ("the MTABA") and Local 183 which was alleged to have made Local 183 the bargaining agent for all of Tactix' construction employees, including its carpenters. According to Tactix and Local 183, Tactix was bound to the MTABA agreement because it was an employer carrying on related businesses with Danand, Stash and Mark/Barry, and Mark/Barry was bound to the MTABA agreement.

4. An essential element of their theory was that the MTABA agreement established bargaining rights for Local 183 for carpenters of employers bound to the agreement. At the time the requests for reconsideration were made, that issue was being litigated with respect to another employer unrelated to any of the five corporations named in this proceeding, before a different panel of the Board. All of the parties agreed that it would be appropriate to adjourn the request for reconsideration and this application until that issue was decided by the other panel. The other panel of the Board ultimately found that Local 183 did not have bargaining rights for carpenters employed by employers bound to the MTABA agreement.

5. When that issue was finally resolved, Tactix and Local 183 requested leave to withdraw their applications for revocation of Local 27's certificate and in addition, Tactix requested leave to withdraw this application. The Board consented to the request for withdrawal of the applications for reconsideration but, for the reasons given in its decision which issued August 21, 1989, refused Tactix' request to withdraw this application. After two further adjournments at the request of Tactix and Local 27, Local 27's request for relief under subsection 1(4) of the Act came before the Board for hearing on February 26, 1990.

6. Tactix and Jilsen were represented by counsel at the hearing, but Mark/Barry, Stash and Danand were neither present nor represented. The parties filed an agreed statement of facts with the Board which had been executed between Tactix, Jilsen and Local 27. They also stipulated further facts orally to the Board and Local 27 filed the most recent corporate returns of the corporations and a copy of minutes of settlement executed between Local 27, Local 506, Tactix and Jilsen at the time the two unions' applications for certification were being processed by the Board.

7. The parties agreed as well that the Board should determine from the agreed facts and the documents filed by Local 27 whether any two or more of the five corporations carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act. The parties agreed further to limit their submissions to the issue of whether the Board should exercise its discretion to make the declaration requested by Local 27 in the event that the Board finds, on those facts, that it does have the discretion. Accordingly, the Board's findings of fact herein are made from the agreed statement of facts executed between Tactix, Jilsen and Local 27, the further facts agreed to by them at the hearing and the documents filed by Local 27 at the hearing.

8. Mark/Barry was incorporated in the earlier 1970's and, from that time until approximately 1981, was involved primarily in the construction and development of apartment complexes. It has been inactive and has employed no employees since 1981. From incorporation until the making of this application, Mr. Mel Greenspoon was president and a director of Mark/Barry and held a thirty-seven and a half per cent ownership interest in it. Stash was formed as a joint venture in the late 1970's by Mark/Barry and another corporation. Mark/Barry held a fifty per cent interest in

Stash. Stash constructed a number of apartment buildings in the Metropolitan Toronto area in the late 1970's and early 1980's. It has been inactive and has employed no employees since approximately 1983. Greenspoon was the secretary and a director of Stash, and remained so as at the date of making of this application. Danand was incorporated on April 20, 1977, and between then and 1985 it built at least one apartment project in the Metropolitan Toronto area. Mr. Andy Senyi was its vice-president and one of its directors from incorporation until 1985 when he resigned those positions. Jilsen was incorporated February 11, 1982. Its relationship with Tactix began when Tactix was incorporated June 24, 1982. Jilsen owns twenty-five per cent of the shares of Tactix and between 1982 and April 30, 1988, Jilsen employed the carpenters and construction labourers who performed construction work for Tactix. These trades were employed by Jilsen for administrative reasons because Tactix did not have a computerized payroll. It established a computerized payroll on April 30, 1988, and at that time Jilsen ceased to employ any employees and has remained inactive in the construction industry without employees since that time. Tactix has been involved in construction projects in the ICI and residential sectors of the construction industry. Senyi is the president and sole director of Tactix. Greenspoon is vice-president in charge of Tactix' construction activities. Greenspoon directed the construction activities of Mark/Barry and Stash during all of the time when they were active in the construction industry. He also directed the construction activities of Danand from its incorporation until he resigned his position with Danand in 1985 at the same time Senyi resigned as vice-president and director.

9. In the minutes of settlement executed January 25, 1988, between Local 27, Local 506, Tactix and Jilsen, both parties agreed that Tactix and Jilsen are related employers within the meaning of the *Labour Relations Act*. As a condition of the minutes of settlement, Local 27 and Local 506 withdrew applications for certification which each had made in January 1988 with respect to carpenters and construction labourers employed by Tactix and Jilsen.

10. It is agreed that Mark/Barry joined the Metropolitan Toronto Apartment Builders Association in 1976. It is undisputed that Mark/Barry became bound to the MTABA agreement at that time and that Local 183's bargaining rights under that agreement survived at the date of making of this application.

11. Subsection 1(4) of the *Labour Relations Act* provides as follows:

> (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The subsection sets out three preconditions which must be satisfied in order for the Board to have discretion to treat more than one corporation, individual, firm, syndicate or association or any combination thereof as constituting one employer for purposes of the Act. They are:

(1) there must be more than one corporation, individual, firm, syndicate or association or any combination thereof;

(2) the activities or businesses of two or more of those entities must be under common control or direction; and

(3) the entities concerned must carry on related or associated activities or businesses.

It is not necessary that the related or associated activities or businesses be carried on simultaneously. For examples, see *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and *Warren Steeplejacks Limited*, [1989] OLRB Rep. March 309.

12. Although the facts do not establish a common ownership link between the five corporations, their construction operations during their periods of activity in the residential sector of the construction industry were effectively under the control of one person, Mel Greenspoon. In addition, Greenspoon was a director and/or officer of Mark/Barry, Stash and Tactix and remains so today. Andy Senyi also was a director and/or officer of Danand and Tactix. He resigned his position in Danand in 1985 but remained president and sole director of Tactix as at the date of making of this application. Jilsen owns twenty-five per cent of the shares of Tactix, with which it was engaged in residential construction activities. Tactix, Jilsen and Local 27 agree that Tactix and Jilsen carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act.

13. Therefore, on those facts, the Board is satisfied that Mark/Barry Holdings Ltd., Stash Investments Inc., Danand Investments Limited, Jilsen Investments Inc. and Tactix Construction Limited are corporations carrying on associated or related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act. Thus, the statutory preconditions exist for the Board to have the discretion under subsection 1(4) to treat two or more of those corporations as constituting one employer for purposes of the Act. It remains to be decided whether the Board should exercise this discretion respecting any two or more of the five corporations just named. That question will be decided based on the facts before the Board and the submissions thereon of counsel. Although the Board will not summarize their submissions, it has reviewed and weighed them in coming to the conclusions reached below.

14. When Tactix made this application in conjunction with its request to have the certificate which the Board had issued to Local 27 revoked, Tactix had asserted the labour relations purpose of its application to be the apparent conflict between Local 27's bargaining rights and those alleged for Local 183 under the MTABA agreement. If that was the purpose, it evaporated when Tactix and Local 183 accepted the conclusion of another panel of the Board that the MTABA agreement did not contain bargaining rights for carpenters employed by the employer bound to that agreement in the application before that panel. Tactix also asserted that there was no other valid labour relations purpose for the application. Those grounds were advanced by Tactix at the hearing into Local 27's request to have the application processed on its merits. The Board rejected Tactix' argument for the reasons set out in its August 21, 1989 decision.

15. Local 27's concern then and now is founded in the readiness and willingness with which Tactix sought to revive the four dormant corporations as a basis for asserting that Local 183 held prior collective bargaining rights for Tactix' carpenters employed in the residential sector of the construction industry. Had Tactix been able to establish that the MTABA agreement did indeed give Local 183 bargaining rights for Tactix' carpenters and had it been successful in getting the Board to declare that Tactix, Mark/Barry, Stash and Danand were to be treated as constituting one employer, the result would have been the elimination of Local 27's bargaining rights with respect to the residential sector.

16. The Board has commented before that "...a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases or specialized kinds of construction work, depending largely upon the business opportunities which present themselves,...". *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720,

at paragraph 20. In this respect see also the Board's comments at paragraph 13, *Brant Erecting and Hoisting*, *supra*.

17. Having regard to the ease with which a firm can become active and cease to be active in the construction industry, Tactix' readiness to revive Mark/Barry, Stash and Danand four months after the Board issued its certificate to Local 27 respecting Tactix' carpenters employed in the residential and other sectors of the construction industry, sends a clear message to Local 27 about the vulnerability of those bargaining rights to potential erosion unless Local 27 is protected by a declaration under subsection 1(4) of the Act to treat those corporations as one employer for purposes of the Act.

18. The Board agrees with Local 27's perception that its bargaining rights would be exposed to potential erosion if the Board does not make the declaration requested. The Board does not agree, however, that the existence of Danand Investments Limited poses a threat to Local 27's bargaining rights. This is because both Greenspoon and Senyi resigned from their positions with Danand in 1985 and would no longer be able to exercise any direction over its construction activities. With respect to the other corporations, however, Greenspoon remains an officer and/or a director of Mark/Barry, Stash and Tactix, Senyi is president and sole director of Tactix. Tactix is twenty-five per cent owned by Jilsen and they were still engaged together in residential construction when the Board certified Local 27 for Tactix' carpenters. Greenspoon also remains in charge of the construction activities of Tactix.

19. In these circumstances, and having regard for the fact that Tactix was prepared to rely on the interrelationship of Mark/Barry, Stash and Danand in order to try and extinguish Local 27's bargaining rights for Tactix' carpenters in the residential sector, the Board is satisfied that Mark/Barry, Stash, Jilsen and Tactix are a source of potential erosion of Local 27's bargaining rights. Therefore, the Board is satisfied that these are circumstances in which it should exercise its discretion under subsection 1(4) of the Act to declare that Mark/Barry Holdings Ltd., Stash Investments Inc., Jilsen Investments Inc. and Tactix Construction Limited be treated as constituting one employer for the purposes of the *Labour Relations Act*, and the Board so declares. Accordingly, Mark/Barry Holdings Ltd., Stash Investments Inc., Jilsen Investments Inc. are bound to the carpenters provincial agreement and, together with Tactix, they are obliged also by section 15 of the *Labour Relations Act* to bargain in good faith with the United Brotherhood of Carpenters & Joiners of America, Local 27 and make every reasonable effort to make a collective agreement for all sectors of the construction industry, except the industrial, commercial and institutional sector.

20. For the reasons given above, this application is dismissed with respect to Danand Investments Limited.

2624-89-M Corporation of the County of Simcoe **(Trillium Manor Home for the Aged),** Employer v. Ontario Nurses' Association, Trade Union

Conciliation - Hospital Labour Disputes Arbitration Act - Reference - Sale of a Business - Board of arbitration constituted - Business sold - New employer requesting Minister to appoint a conciliation officer - Whether Minister can appoint a conciliation officer even though an arbitration board has been established under HLDAA - Sale of a business provision does not preserve all the rights of a union as they stood at the time of sale - Board advising Minister that he is required to appoint a conciliation officer

BEFORE: *Ken Petryshen,* Vice-Chair, and Board Members *G. O. Shamanski* and *H. Peacock.*

APPEARANCES: *Steven F. Wilson* and *Lynda Toms* for the employer; *David Nicholson* for the trade union.

DECISION OF THE BOARD; April 4, 1990

1. This is a reference to the Board by the Minister of Labour pursuant to section 107 of the *Labour Relations Act* ("the Act"). The Minister has referred to the Board for its advice the following question:

> Is the Minister required to appoint a conciliation officer in this case even though an arbitration board has already been established under the *Hospital Labour Disputes Arbitration Act*?

2. The parties agreed on the facts. In December 1987, the Ontario Nurses Association ("ONA") was certified to represent a bargaining unit of nurses employed by the Ladies Orange Benevolent Association ("LOBA"). LOBA operated a home for the aged which is an institution included within the definition of "hospital" in the *Hospital Labour Disputes Arbitration Act* ("HLDAA"). Shortly after ONA was certified, it gave notice to bargain to LOBA. The negotiation process resulted in the resolution of some issues, the appointment of a conciliation officer and the Minister issuing a no collective agreement report. A board of arbitration was constituted and the dispute is scheduled to be heard by that board on April 11, 1990.

3. On July 31, 1989, LOBA sold the business to the Corporation of the County of Simcoe ("the Corporation"). After some discussion between ONA representatives and representatives of the Corporation, a bargaining session took place on September 25, 1989. On September 27, 1989, ONA sent the Corporation a notice to bargain. The Corporation applied for the appointment of a conciliation officer on November 23, 1989 and it was ONA's objection to the appointment that gave rise to this reference.

4. Counsel for the Corporation argued that the Board should advise the Minister that he has the authority to appoint a conciliation officer in these circumstances. Counsel took the position that, upon the sale of the business to the Corporation, ONA was required to give notice to bargain to the Corporation and that all of the statutory mechanisms are then available to these parties, including the appointment of a conciliation officer. In counsel's submission, the Corporation is not required by law to inherit any results of the bargaining process between ONA and LOBA. In particular, it is argued that the board of arbitration constituted by ONA and LOBA has no jurisdiction subsequent to the sale of the business to the Corporation. In support of its position, the Corporation relied primarily on *Davidson-Walker Funeral Homes*, [1981] OLRB Rep. Oct. 1359.

5. Very generally, counsel for ONA argued that the Board should advise the Minister that on these facts he does not have the authority to appoint a conciliation officer. If the Board felt compelled to advise the Minister that he can appoint a conciliation officer in this situation, counsel submitted that the Board should advise the Minister that he should not make the appointment until after the presently-constituted board of arbitration has performed its functions. ONA takes the position that the board of arbitration that has been constituted continues to have jurisdiction. In response to the Corporation's reliance on *Davidson-Walker Funeral Homes*, *supra*, counsel for ONA argues that the Board should take a different approach given the interrelationship between the Act and the HLDAA.

6. Counsel for ONA emphasized the consequences of accepting the Corporation's position for ONA and the employees in the relevant bargaining unit and argued that the Legislature could not have intended such consequences. Counsel noted that the process of obtaining a collective agreement under the HLDAA is often a lengthy one. Counsel noted that an interpretation of the Act and HLDAA as suggested by the Corporation would have the effect of delaying and postponing the concrete benefits of unionization for a considerable and unwarranted length of time. Counsel referred to subsections 10, 11 and 13 of Section 10 of HLDAA in emphasizing that the timing of the notice to bargain is particularly significant under the HLDAA.

7. In considering this matter, the panel has reviewed the HLDAA as well as the relevant provisions of the Act. For convenience, we set out below section 16(1) and (2) and section 63(3) and (10) of the Act as well as certain provisions of the HLDAA:

Ontario Labour Relations Act

16.-(1) Where notice has been given under section 14 or 53, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(2) Notwithstanding the failure of a trade union to give written notice under section 14 or the failure of either party to give written notice under sections 53 and 122, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

63.-(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

• • •

(10) For the purposes of sections 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

• • •

Hospital Labour Disputes Arbitration Act

2.-(1) This Act applies to any hospital employees to whom the *Labour Relations Act* applies, to

> the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.
>
> (2) Except as modified by this Act, the *Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employers of such employees.
>
> **10.**-(10) Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties shall remain in force for a period of one year from the effective date of the document.
>
> (11) Notwithstanding the provisions of subsection (10) and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years.
>
> (a) from the day upon which notice was given under section 14 of the *Labour Relations Act*; or
>
> (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 53 of the *Labour Relations Act*.
>
> • • •
>
> (13) In making its decision upon matters in dispute between the parties, the board of arbitration may provide,
>
> (a) where notice was given under section 14 of the *Labour Relations Act*, that any of the terms of the agreement except its term of operation shall be retroactive to such day as the board may fix, but not earlier than the day upon which such notice was given; or
>
> (b) where notice was given under section 53 of the *Labour Relations Act*, that any of the terms of the agreement except its term of operation shall be retroactive to such day as the board may fix, but not earlier than the day upon which the previous agreement ceased to operate.

8. As noted earlier, the case which the Corporation relies on and which ONA argues does not address the facts of this situation is *Davidson-Walker Funeral Homes*, *supra*. The case involves an application under section 92 of the Act in which the applicant alleged that because of a sale of a business a lawful strike against its predecessor cannot be lawfully continued. The Board decided that a trade is not permitted to continue to strike, nor an employer permitted to continue to lock out when the sale of a business has occurred, but in the circumstances declined to exercise its discretion to grant the applicant any relief and dismissed the application. The Board's reasoning on the strike issue has relevance to this case. After noting that the resolution of the complaint before it turns on the interpretation of section 63 of the Act, the Board made the following comments:

> 9. Section 63 as it now stands has evolved through several amendments of the Act. A review of the history of the section is helpful to a better understanding of the rights and duties which it confers on unions and employers respectively.
>
> 10. Prior to the enactment of successorship legislation, the bargaining rights of a trade union terminated upon the sale or disposition of a business. The common law afforded no protection to established collective bargaining rights when the employer's legal identity was altered. As concluded in earlier cases such as *Brantford Produce Company Ltd.* 61 CLLC ¶16,193, unless the parties to the employment relationship were contractually bound or the union had been certified for that specific employer's business, the Board could not enforce collective bargaining. A mere change in the legal ownership of the business was therefore fatal to the trade union's representation rights.

11. In the 1962 Ontario Royal Commission's *Report on Labour - Management Relations in the Construction Industry*, (the Goldenberg Report), the need for statutory protection of a trade union's bargaining rights upon a transfer of ownership was seen as essential to orderly industrial relations. At. p. 114 of its report, the Commission suggested:

> i. The Act should provide that where a business or part thereof is sold, leased or transferred, the purchaser, lessee or transferee shall be bound by all the proceedings before the date of sale, and shall become ipso facto a party thereto, and that the proceedings shall continue as if no such change has occurred, and that if a bargaining agent was certified the certification shall remain in effect, and if a collective agreement was in force that agreement shall continue to bind the purchaser, lessee or transferee to the same extent as if it had been signed by him.
>
> ii. Consideration should be given to measures for the protection of acquired bargaining rights in situations arising from certain types of business practices which may affect such rights, for example, where a contractor, engaged on a number of projects in each of which he has a different partner, is in a position to shift employees from a project with respect to which certification has been granted to another.

12. In response to this concern the Legislature enacted successor rights legislation in the form of the *Labour Relations Amendment Act*, S.O. 1962-63, c. 70, s. 47(a), which provided:

47a.-(1) In this section,

> (a) 'business' includes a part of parts thereof;
>
> (b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' having corresponding meanings.
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or on behalf of whose employees a trade union has been certified as bargaining agent or has given or is entitled to give notice under section 11 or 40 sells his business, the trade union continues, until the Board otherwise directs, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 11.

13. It should be noted that the Legislature's first intention, reflected in *The Labour Relations Amendment Act*, S.O. 1961-62 c. 28, was to enact a provision similar to the present section 63, including the "flow through" of any collective agreement in effect at the time of the sale of a business. However that amendment was not proclaimed in force and the more limited rights described above were enacted instead. It is clear from these tentative and incremental legislative steps that in its first proclaimed version section 63(2) (then section 47a(2)) was intended only to preserve the bargaining rights of the trade union on the sale of a business. The union then gained the advantage of not being required to reorganize and obtain certification in respect of the like bargaining unit in the business of the new employer. The limited right which the union had, however, was to give notice to bargain to the new employer, who in turn must recognize its right to act as exclusive bargaining agent, as though it had been certified. It is clear that in enacting that legislation the Legislature was concerned only with protecting the union's bargaining rights. To the extent that a collective agreement could not survive the sale of a business, the Legislature obviously did not intend to preserve the established rights of employees, apart from the right to be represented by the same union.

14. The Legislature did not, in other words, adopt the broader Goldenberg recommendation that when a business is transferred the purchaser of the business should be "bound by all of the

proceedings before the date of sale". As noted in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 702 the purpose of section 47a was twofold:

> To prevent the subversion of bargain-rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect 'paper transactions', and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47(a) to preserve the bargaining rights and has attempted to look beyond 'paper transactions' to achieve that purpose.
>
> To preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect of a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47(a) allows the union to pursue that bargaining right when all or part of the business is sold.

15. It is significant that the language of section 47(a)(2) as first enacted, which is the very language of the present section 63(3), did not preserve the rights of employees or their union under the Act as they stood at the time of a sale; only the right of representation was preserved. This was reflected by the following observation of the Board in *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,053:

> Section 47(a) does not operate to bind the successor of the business with the collective agreement which has been made between the union and the predecessor employer but only with the obligation to recognize the union's bargaining rights for his employees in a like bargaining unit. The new employer is therefore, left free to bargain for and to negotiate his own agreement with the union.

16. It was not until a further amendment of *The Labour Relations Act* in 1970 (*The Labour Relations Amendment Act 1970* (No. 2), S.O. 1970, c. 85, s. 22) that the language currently found in section 63(2) was introduced. That legislation provided for the flow through of a collective agreement that was in effect at the time of a sale.

17. The section was amended to provide, in part:

> 47(a)(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council or trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purpose of the application as if he were named as the employer in the application.
>
> (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or had given or is entitled to give notice under section 11, sells his business, the trade union or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement and such notice has the same effect as a notice under section 11.

18. Under the then section 47(a)(2) (later section 55(2) and now section 63(2)) a subsisting collective agreement was protected from termination upon a sale of a business. Significantly the amended section 47(a)(3) (now section 63(3) as further amended by S.O. 1975, c. 76, s. 15(1))

adopted the very language of the earlier section 47(a)(2) to describe the rights of a union which did not have a collective agreement, but was certified and had given notice or was entitled to give notice to bargain under section 13 (now section 14). In 1975 the same language was extended to explicitly cover a union whose collective agreements had expired at the time of the sale of a business. The right of a union, whether in a first agreement negotiation or in a renewal situation, was to give the new employer notice to bargain, such notice to have the same effect as notice under section 13 (now 14) or section 45 (now 53).

19. Counsel for the union concedes that the giving of notice under section 63(3) has significant legal consequences to the extent that, in the words of the Act, it "has the same effect as a notice under section 14 or 53..." Notice under those sections triggers the duty to bargain and the negotiation and conciliation processes which are the preconditions to a lawful strike or lockout under the Act. More specifically, section 15 of the Act requires the parties to meet and bargain within fifteen days from the giving of the notice. The notice effectively freezes the rights and duties of the union, the employer and the employees by the operation of section 79(1) of the Act. Where the notice has been given under section 14 or 53 the Minister is required, by section 16 of the Act, to appoint a conciliation officer. By virtue of section 72(2) of the Act where no collective agreement is in operation no strike or lockout can commence until the Minister has appointed a conciliation officer and fourteen days have elapsed after a no-board report. The scheme of bargaining under the Act clearly contemplates that the giving of notice under sections 14 and 53, and by clear extension the giving of notice under section 63(3) of the Act, are required before a union can lawful strike or an employer can lawfully impose a lockout. That is not disputed by the union in the instant case. Counsel for the union maintains, however, that in this case the union did not give notice under section 63(3). In her view the union is therefore free to pursue the continuation of the prior right to strike which matured against the predecessor employer, Davidson Funeral Homes.

20. In other words, counsel for the union submits that sections 63(3) gives the union a choice. She argues that when the sale of a business takes place during a strike the union may either continue the strike as an ongoing incident of continuing bargaining or, in the alternative, it can give notice to the employer under section 63(3), thereby ending its strike and reverting to the negotiation and conciliation process that must be pursued to the point of a no-board report before a strike can be lawfully undertaken against the new employer.

21. In our view that analysis of section 63(3) raises some fundamental problems. Firstly, bearing in mind that legislation must be presumed to have some meaning and purpose, it is difficult to see why a union should need the alternative which she describes. Mediation is generally available to willing parties when a strike is ongoing. Moreover, there is nothing under the Act to prevent a union from pursuing mediation and suspending ongoing strike for such time as it sees fit, assuming no lockout has been imposed. It is difficult to see why the Legislature would have deliberately fashioned the possibility of a second round of conciliation as a precondition to a strike at the option of the union when the union already has the capacity to suspend its strike and explore the possibility of a mediated solution to its dispute.

22. A further difficulty with the union's interpretation is the obvious inequality in bargaining that it would create. In the scheme of the Act the strike and lockout are co-relative rights. Neither party can strike or lockout until the requirements of the Act, in the form of notice, bargaining conciliation and the lapse of time after a no-board report have been met. A significant feature of the balance of bargaining under the Act is that neither party can, except by making a collective agreement, remove the other's power to lawfully use economic sanctions once those conditions precedent have been met. As a corollary right, the choice as to the timing of a strike or lockout rests entirely in the discretion of the union and employer respectively. If the union's interpretation of section 63(3) obtains, that fundamental balance would be shifted on the sale of a business. If we were to accept the union's interpretation, the Act so construed would give to the union the unilateral right to end not only an ongoing strike by giving notice under section 63(3), but also the unilateral right to end an ongoing strike lockout by giving the same notice. Since the power of notice under section 63(3) is exclusively the union's, the employer could not exercise a similar right. Counsel for the union was not troubled by that anomaly. We are.

23. We cannot accept the union's construction of the rights granted by section 63(3) of the Act. Its interpretation would spawn procedures that are unnecessary and which are fundamentally

counter to the scheme of bargaining generally contemplated by the Act. In effect, counsel for the union submits that section 63(3) of the Act, by continuing the union's right to bargain for the employees has, in the words of Goldenberg, continued all collective bargaining proceedings as they were before the sale. Neither the history nor the words of the section support that conclusion.

24. The limited words of section 63(3) of the Act and their piecemeal evolution stand in sharp contrast to the plain words that might have been chosen to impart the intention advanced by the union, and which have been chosen by the Legislature in a different context of successorship. Section 62 of the Act, which deals with the consequences of amalgamation or merger by which one union may become the successor another, is unequivocal in its terms. Where there has been a merger, amalgamation or transfer of jurisdiction the section vests in the Board the authority to declare that the successor union has "acquired the rights, privileges and duties under this Act of its predecessor" and subsection 3 of section 63 provides:

> Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall reorganize such status in all respects.

25. The wording chosen by the Legislature to describe the rights of a union vis-a-vis the successor employer where no collective agreement is in effect are obviously more limited. The plain reading of the section leads to the conclusion that the union has what the section gives it, namely the entitlement (in our view a word indistinguishable from "right") to give notice to the new employer of its intention to bargain to make a first collective agreement or to renew and amend a previously expired collective agreement. By the inescapable words of the Act the notices so given, for the purposes set out in subsection (10) of section 63, has the same effect as certification.

26. The issue in this case relates directly to the issue before the Board in *Oxford Manor Rest Home*, [1980] OLRB Rep. Dec. 1786. In that case the Board was required to assess a union's claim that a freeze of the employee's rights under section 79 of the Act instituted by notice to bargain to the predecessor employer continued in effect against the successor employer after the sale of the business. Interpreting section 63(3) (then 55(3)) the Board determined that the freeze binding the predecessor employer, triggered by notice to it under section 14 of the Act, did not survive the transfer of the business. In other words, the rights of the union as against the prior employer as they stood under the Act at the time of the sale did not continue without interruption to bind the new employer. Any freeze of the conditions of employment binding the successor employer was found to originate entirely in the notice to bargain given to the successor employer under section 63(3) of the Act and extended only to conditions as they stood at that date. In concluding that section 63(3) does not vest in the union all ongoing proceedings and rights under the Act as against the successor employer the Board commented at p. 1788:

> In essence the trade union, such as in the instant case, continues 'to be the bargaining agent for the employees of the person to whom the business was sold' and 'is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement'. Nothing in the section explicitly puts the new employer into the shoes of the previous employer so as to make all the rights and obligations relating to the collective bargaining relationship automatically attach to the new employer. The fact that the Legislature has specifically set out that the trade union shall continue to be the bargaining agent and shall have the right to serve notice to bargain on the new employer, militates against there being any additional rights or privileges from any other notice to bargain which may have been served on the previous employer. This view is further fortified by an examination of section 55(2) which, in dealing with a sale of business while an application for certification or termination is before the Board provides, '... person to whom the business has been sold is ... the employer for the purposes of the application as if he were named as the employer in the application'. In this latter case where the Legislature intended that the new employer should fit precisely into the shoes of the previous

> employer it has explicitly said so. Had the Legislature similarly intended in section 55(3) we have no doubt it would have said so.
>
> 27. It should be noted that the giving of notice to a successor employer under section 63(3) affords the union extraordinary protection to its bargaining rights - protections which are clearly beyond those available if the section were merely to continue all proceedings under the Act as they stand at the time a business is sold. In a recent decision the Board had occasion to explore the benefit to a union conferred by sections 63(3) and (10). In *Vaunclair Meats Limited*, [1981] OLRB Rep. Aug. 1186 the Board found that the giving of notice by a union under section 63(3) (then 55(3)) has the effect of sheltering a union for at least one year from applications for the termination of its bargaining rights or from raids by another union. When a union gives notice under the section that would otherwise be the open period in which the union is vulnerable to termination or displacement is effectively closed. In dismissing the application for termination brought by an employee in that case the Board commented:
>
> > Where a business has changed hands the possibility of greater stress on a union is real; it can no longer be sure that it will bargain with the same expectations along the paths that it travelled time and again with the predecessor employer. In this sense a union bargaining with a successor employer after the transfer of a business is in a situation similar to a union bargaining a first collective agreement after certification. By enacting section 55(10) of the Act the Legislature has recognized that reality and provided the union faced with a first negotiation with a successor employer the same protection of its bargaining rights as would operate to protect the negotiation of a first collective agreement. Like a newly certified union, a union dealing with a successor employer can proceed with the assurance that its bargaining rights cannot be subject to attack for a minimum of one year. That is the unequivocal effect of section 49(1) of the Act and it is the clearly intended consequence of section 55(10) of the Act.
>
> 28. There are compelling reasons for qualifying the rights of unions and employers by postponing the right to strike or lock out on the sale of a business. By the present operation of article 63(3) an employer who purchases a business during a strike is given at a minimum the opportunity to advance his own proposals and attempt to make a collective agreement in an atmosphere free of the inevitable tension of a strike or lockout. The industrial dispute will, after all, generally not be of his own making. The new employer may well bring to the bargaining table a substantially different point of view, shaped by such various factors as his own production and marketing strategies, his employment policies or collective agreements in other plants, his general objectives for the business, and an economic well being that may differ substantially from his predecessor's. In many respects he may display a more positive face with more positive results. The view, implicit in the Act, therefore, is that at the moment of the sale the successor employer should be given a fair opportunity to bargain initially in an atmosphere devoid of the stress caused by a lockout or strike. Moreover, the opportunity so given to the new employer is not prejudicial to the union in any terminal sense. The right to strike the new employer is not removed; it is only postponed for the time which the Act allows for any two parties to avail themselves of the statutory mechanisms designed to assist them to reach an accommodation. In our view that result is more consistent with the scheme of the Act. It is, moreover, the only conclusion supportable on the words of section 63 viewed in the overall context of the statute.

9. We agree with the above reasoning and we are satisfied that it does support the position of the Corporation in this case. We note that the statutory provisions which are determinative are contained in the Act and not in the HLDAA. The sale of a business, the notice to bargain and the appointment of a conciliation officer provisions are in the Act and these provisions are not modified by the HLDAA. The fact that the circumstances of this case concern a "hospital" as defined by the HLDAA cannot affect the Board's interpretation of section 63 of the Act.

10. The essence of *Davidson-Walker Funeral Homes*, *supra*, is that section 63 of the Act has the effect on a sale of a business of preserving a trade union's bargaining rights and a collective agreement, if one exists. Section 63 of the Act does not preserve all of the rights of employees or their trade union as they stood at the time of the sale. When a sale occurs after certification and before a collective agreement is executed, the trade union has the right to give notice to bargain to

the successor and that notice has the same effect as certification under section 7 of the Act. The trade union and the successor, the Corporation in this case, are free to engage in collective bargaining and to utilize all of the dispute resolution mechanisms available to them, including in this case, a conciliation officer and a board of arbitration if necessary. Given this scheme, the Board is of the view that the board of arbitration constituted by LOBA and ONA cannot have any impact on the parties to this application subsequent to the sale of the business from LOBA to the Corporation.

11. Accordingly, the Board's advice to the Minister is that he is required to appoint a conciliation officer in this case even though an arbitration board has already been constituted under the *Hospital Labour Disputes Arbitration Act*.

CONCURRING OPINION OF BOARD MEMBER H. PEACOCK; April 4, 1990

1. I concur in the Board's advice to the Minister and add the following observations.

2. In paragraph 10 above the Board writes that:

> ...the board of arbitration constituted by LOBA and ONA cannot have any impact on the parties to this application subsequent to the sale of the business from LOBA to the Corporation.

3. That first board of arbitration was scheduled to convene April 11, 1990. The question then may be, does the first board of arbitration have jurisdiction to settle terms and conditions for the period from the first notice to the date of sale. It may decide that it does not. Such a decision would require the parties to put their positions regarding the pre-sale period terms and conditions before the second conciliation officer and ultimately a second board of arbitration, if one is required. Though it was not for the Board to decide in advising the Minister, a result is possible, from considering the submissions of counsel, that no tribunal may have jurisdiction for the period from the date notice was first given following certification to the date of sale, an interval of 19 months in this case. The Goldenberg report contemplated that the purchaser should be "bound by all the proceedings before the date of sale", but the Legislature did not adopt this broader recommendation in enacting section 63 as it is now numbered. (Paragraph 14 of *Davidson-Walker Funeral Homes*, *supra*). Instead, by enacting subsection 63(10) which gives the notice of desire to bargain following a sale the same effect as certification, the Legislature may have afforded the parties, but especially the new employer, a clean slate, erased of all of the matters, settled or otherwise, that were on the bargaining table prior to the sale. When time runs, as it has in this case, the impact of decisions of the Labour Relations Board and possibly two boards of arbitration may be to deny the affected employees for a very long period of time the access to collective bargaining their certificate granted them.

4. We were not advised of any application for termination of bargaining rights. The trade union has maintained its representational duties, obviously. There has likely been a reliance by employees on an expectation that there will be a collective agreement covering the period from the date notice to bargain was given following certification in December 1987. This Board cannot amend the law. But in agreeing that this panel has correctly applied the law I feel compelled to say that the Board must point out this potential lapse in the law for these employees, as part of our advice to the Minister.

0368-89-U; 0369-89-U; 0857-89-U Anna Wilson, Complainant v. Ontario Public Service Employees Union and Ontario Public Service Employees Union, Local 110, Respondents v. Fanshawe College, Intervener #1 v. Ontario Council of Regents for the Colleges of Applied Arts and Technology, Intervener #2; Anna Wilson, Complainant v. Ontario Public Service Employees Union and Ontario Public Service Employees Union, Local 110, Respondents v. Fanshawe College, Intervener #1 v. Ontario Council of Regents for the Colleges of Applied Arts and Technology, Intervener #2; Anna Wilson, Complainant v. Ontario Public Service Employees Union, Respondent v. Fanshawe College, Intervener #1 v. Ontario Council of Regents for the Colleges of Applied Arts and Technology, Intervener #2

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Motion by counsel for the complainants to have the Board remove counsel for the union on basis of conflict of interest - Argued that counsel for respondent had acted on behalf of the complainants on grievances and had received confidential information in that capacity - Whether Board has the jurisdiction to compel a party to change counsel - Board discussing jurisdiction over professional conduct of barristers and solicitors - Board declining to entertain motion on discretionary grounds

BEFORE: *Judith McCormack,* Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong.*

APPEARANCES: *Joseph Hoffer* and *Anna Wilson* for the complainants; *James Hayes, Stephen T. Goudge, R. Ross Wells, Paddy Musson, Gary Fordyce* and *Tom Geldard* for the respondents; *Brenda Bowlby* and *Guy Giorno* for interveners #1 and #2.

DECISION OF THE BOARD; April 26, 1990

1. On the agreement of the parties, the names of the respondents in Files 0368-89-U and 0369-89-U are amended to read: "Ontario Public Service Employees Union and Ontario Public Service Employees Union, Local 110", and the name of the respondent in File 0857-89-U is amended to read: "Ontario Public Service Employees Union".

2. These cases are three complaints which were scheduled to be heard together, all alleging that the union respondents have violated section 68 of the *Labour Relations Act.* Although there is only one complainant, she is joined by a number of grievors listed in the complaint, whom we will also refer to as "the complainants" for the purpose of this decision.

3. At the commencement of the hearing, counsel for the complainants made a motion to have the Board remove James Hayes from his position as counsel for the respondents on the basis that a conflict of interest existed with respect to his representation of the respondents. More specifically, Mr. Hoffer claimed that Mr. Hayes and other members of his firm, Cavalluzzo, Hayes & Lennon, had acted on behalf of the complainants on a variety of grievances and one court application between 1982 and the present, and that they had received confidential information from the complainants in that capacity. It is not clear whether or to what extent that information relates to the grievances which form part of the subject matter of these complaints. Having allegedly received this confidential information, the complainants assert that Mr. Hayes and members of his law firm should not now take a position where they might be tempted, or might appear to be tempted, to use such information against the complainants.

4. Counsel for the parties advised us that they intended to call a total of six or seven witnesses between them to give evidence on the motion, which would consume a number of the days set aside for the hearing of the merits of the complaint. As a result, we asked the parties to first address whether the Board had the jurisdiction to entertain the subject matter of the motion at all and, if we had the jurisdiction, whether in the exercise of our discretion, it was appropriate for us to deal with the matter. The Board also directed the complainants to provide further particulars of the conflict alleged. Subsequently, we issued the following decision:

> The complainants' motion is dismissed. Our reasons will follow.

5. After our ruling, Mr. Hayes concluded on the basis of further investigation of the particulars filed that there might indeed be a conflict of interest in relation to a matter handled by a former member of his firm. As a result, Mr. Hayes stepped down as counsel for the respondents. On the next day of hearing, Steven Goudge from the firm of Gowling, Strathy and Henderson appeared on behalf of the respondents. Counsel for the complainants then made a similar motion, alleging that Mr. Goudge and members of his law firm had represented the complainants in the past on a variety of grievances, and received confidential information in that capacity. As a result, he argued, representing the union in these complaints placed Mr. Goudge and his firm in a conflict of interest position. Once again particulars were requested, which counsel for the complainants agreed to provide. Mr. Hoffer also advised the Board and Mr. Goudge that he intended to file a complaint with the Law Society of Upper Canada, the professional regulatory body for lawyers in Ontario. Mr. Goudge then requested an adjournment for the purpose of receiving and reviewing the particulars referred to above, and obtaining an advisory opinion from the Law Society. Although we granted the adjournment, we also set eighteen more hearing days and the respondents were advised that if they changed counsel for any reason, they would have to obtain counsel prepared to proceed on those days. The respondents were also directed to notify the Board and the other parties by December 31, 1989 whether Mr. Goudge would be continuing to represent the union. If he was, the Board would then rule on the second motion. Subsequently, Mr. Goudge notified the parties and the Board that he had received an advisory opinion from the Law Society, and that he would be continuing to represent the respondents. The Board then dismissed the second motion. We now provide our reasons for the dismissal of both motions.

6. In support of its position that the Board had the jurisdiction to compel a party to change counsel and should proceed to hear the motion on its merits, the complainants argued that the Board had an inherent and implied jurisdiction to remove a solicitor of record in much the same manner as a court, that the Board had an inherent jurisdiction to control its own processes, and that sections 102(13) and 106 of the *Labour Relations Act* provided those powers as well. Counsel referred to the Law Society of Upper Canada's Rules of Professional Conduct and the Canadian Bar Association's Code of Professional Conduct, and suggested that the Board should apply those rules in a manner analogous to the application of the Canadian Charter of Rights in a case before the Board. In his view, the right of parties to choose their own counsel must be balanced against the public's confidence in the administration of justice. While he acknowledged that his motions involved an arguable, rather than a clear cut case of conflict, he asserted that this was the only forum which provided the specific relief he sought. In the alternative, he asked that the Board simply issue a declaration of conflict of interest, rather than removing Mr. Hayes, and subsequently Mr. Goudge, as the respondents' counsel in this matter.

7. With respect to the first motion Mr. Hayes argued that it was designed to disadvantage the respondents by denying them the use of counsel experienced in labour relations and knowledgeable about their affairs, that the motion itself had no merit since the respondents were the clients in all the previous matters described by the complainant and not the complainant and the

grievors, and that the one instance of a court application was unrelated to the matters before us. In his view, the duties between a solicitor and client pertained to the relationship between Cavalluzzo, Hayes and Lennon and the respondents, rather than between Cavalluzzo, Hayes and Lennon and the complainants. However, if the Board had jurisdiction to deal with the matter, the respondents were content to have the Board decide the merits of the motion, given its legal and labour relations expertise. With respect to the second motion, Mr. Goudge adopted Mr. Hayes' arguments.

8. Turning first to the question of whether the Board has the jurisdiction to entertain this motion, we have serious doubts about our ability in this regard. Unlike a superior court which has an inherent supervisory jurisdiction over lawyers, the Ontario Labour Relations Board is an administrative tribunal, and its jurisdiction is founded in the *Labour Relations Act* and other statutes which refer matters to the Board for determination. For the Board to have jurisdiction over the subject matter of the motion, there must be some statutory foundation for it. The complainants referred us to *Minto Construction Ltd.* v. *Regional Assessment Commissioner* (1989), 68 O.R. 350 (H.C.), a case involving the application of the Canadian Charter of Rights and Freedoms to proceedings before the Ontario Municipal Board. We do not find this case particularly helpful for two reasons. Firstly, there is an obvious distinction between the Charter, which is described as part of the supreme law of Canada by virtue of section 52(1) of the *Constitution Act*, 1982, and the Rules of Professional Conduct which, while authorized by section 62 of the *Law Society Act*, do not even appear to be provincial regulations. Secondly, we note that the Ontario Municipal Board is granted all the powers of a court of record by virtue of section 33 of the *Ontario Municipal Board Act*, R.S.O. 1970 c. 323, unlike the Ontario Labour Relations Board. In other words, the case does not stand for the proposition that an administrative tribunal in itself has any inherent jurisdiction, and we do not find the application of the Charter in Board cases to be analogous to the issue before us.

9. Counsel for the complainants also cites sections 102(13) and 106(1) of the *Labour Relations Act* as the basis for his motions, which provide as follows:

> (13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.
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> 106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

10. At first glance, both sections appear broad enough to encompass the motions at hand. However, in our view both sections must be read together with the *Statutory Powers Procedure Act*, R.S.O. 1980 c. 484 ("the S.P.P.A.") which applies to the Board as a tribunal exercising a statutory power of decision within the meaning of section 3 of that Act (see *Rexwood Products Limited*, [1986] OLRB Rep. Aug. 1139). The S.P.P.A. provides in part as follows:

> 10. A party to proceedings may at a hearing,
>
> (a) be represented by counsel or an agent;
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> • • •

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> 23.-(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
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> ***
>
> (3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

11. Section 10 codifies a basic and traditional legal right with which we would be loathe to interfere. While we do not view that right as absolute, its strength and historical resonance in the Canadian legal tradition is such that we are reluctant to read into section 106 and 102(13) the authority to curtail it in the circumstances of this case. We also note that section 23(3) provides that a tribunal cannot exclude a barrister and solicitor from a hearing for the reasons stated therein. When this section was brought to the attention of the complainants, counsel argued that it should be interpreted so that it was only with regard to matters of competence that a tribunal could not exclude a barrister and solicitor. We agree that that is one possible interpretation of the section; however, it does seem to be worded more broadly than that, referring as it does to "understand[ing] and comply[ing] with the duties and responsibilities of an advocate and an advisor". Certainly the subject of these motions could be considered a question of understanding and complying with the duties and responsibilities of an advocate, in this case, the professional responsibilities of a lawyer. Indeed, it makes some sense to us that a tribunal may have the power to limit the appearances of agents who are not presently governed by any other authority, but that the competence and conduct of barristers and solicitors is presumed, since that is regulated by an existing body with a comprehensive structure of rules and procedures. In our opinion, it would be an odd result to find that the Legislature had removed the competence of lawyers from the ambit of tribunals governed by the S.P.P.A., but left their professional conduct or responsibilities within their jurisdiction.

12. It is true that section 23(3) does not specifically pre-empt our ability to make a declaration of conflict of interest, the complainants' alternative request. However, if the underlying purpose of section 23(3) is to remove the professional conduct of barristers and solicitors from the scrutiny of the Board, it would be inconsistent to enter into an investigation of that conduct for the purpose of providing declaratory relief, particularly when that relief is available from a more appropriate forum, such as the Law Society of Upper Canada or, perhaps, a superior court.

13. Ultimately, we do not find it necessary to resolve our doubts about our jurisdiction because we are also of the view that we should decline to entertain this motion on discretionary grounds. We have little difficulty in concluding we have such a discretion. Assuming, without finding, that section 106 is drafted broadly enough to include this motion within its parameters, we do not read it as *requiring* us to determine every question of fact and law which arises, but only *enabling* us to do so. Certainly the Board is presented frequently with evidence and arguments upon which it is not necessary for it to rule, because other evidence or arguments may dispose of the application before it. Often arguments are expressly advanced as alternative positions. As a routine matter then, the Board decides only those questions which it deems necessary to determine the application or complaint before it. If the Board were required to determine every single question of fact and law arising before it, the Board's proceedings would rapidly come to a standstill.

14. Similarly, section 102(13) only authorizes the Board to determine its own practice and

procedure. It leaves open the possibility that our determination may be to refuse to entertain any particular motion. And even if one could characterize the issue here as one involving abuse of process, a proposition which is far from self-evident, section 23(1) of the S.P.P.A only allows the Board to make orders and directions; it does not require us to do so.

15. With that in mind, we must consider whether it is necessary for us to determine the merits of this motion as a concomitant of our responsibilities towards these complaints as a whole. The issue before us in these complaints is whether the union violated its duty to represent the complainants in a manner which is not arbitrary, discriminatory or involving bad faith. The allegations before us cite a sequence of events relating to the settlement of compensation with respect to a number of workload grievances, an agreement on a consent arbitration award, and subsequent amendments to a collective agreement. It is not alleged in these complaints that the representation of the respondents by either Mr. Hayes or Mr. Goudge is in itself a violation of section 68. Rather, the conflict of interest question relates to a matter separate and apart from the respondents' duties towards the complainants under the *Labour Relations Act*. We can certainly determine whether there has been a violation of section 68 without deciding whether the professional responsibilities of the respondents' lawyers prevent them from representing the respondents in these complaints. That issue is entirely superfluous to the merits of these complaints.

16. If we are not required to decide this motion, in our view it would be unwise to do so. In the first place, there is a real likelihood of conflicting decisions were we to determine the merits of this kind of issue. There is no question that the Law Society of Upper Canada is charged with the jurisdiction to determine matters relating to the professional conduct of lawyers in Ontario. Indeed, the Rules of Professional Conduct the complainants wish us to apply in this case are a creation of the Law Society in pursuance of its powers to supervise the legal profession. In addition, it may also be that the inherent jurisdiction of the courts extends even to the conduct of counsel not currently before them in an action. It is possible that if the Board decided, for example, that there was no conflict of interest in this case, the Law Society or a court might decide otherwise, resulting in obvious difficulties.

17. We are also concerned that entertaining this kind of motion might well have the affect of tying up a significant portion of the Board's time and resources. The Board was originally designed as an adjudicative body which would resolve labour relations matters in an informal and expeditious manner. We must be constantly vigilant that our processes do not evolve into something more cumbersome, time-consuming and expensive than the court proceedings they were intended to replace. There is no doubt that parties are now more commonly represented by legal counsel, and as a result, the Board has had to consider a number of related issues which are essential to decisions on contested issues before it. One typical example is deciding whether certain evidence relating to conversations between a lawyer and a client is "privileged", in the course of determining its admissibility. But the Board has only extended itself into this area to the extent necessary to facilitate its hearings and the disposition of the various kinds of applications and referrals contemplated by the *Labour Relations Act*. What we are asked to do here is to go one step further, and decide a matter of professional conduct which is essentially unrelated to the primary issue involved in the complaints. In our view such an excursion would be at best, gratuitous, and at worst, foolhardy. It was indicated by counsel for the complainants that he had at least five witnesses to call on the merits of the conflict of interest motion. The respondents indicated that they would have one or two witnesses. With three parties entitled to cross-examination, this was likely to add a significant number of days to the already extended hearing schedule for these cases. It appears to us that entertaining motions relating to counsel's conduct or the propriety of their representation could occupy the Board's scarce resources in lengthy disputes unrelated to its mandate under the *Labour Relations Act*, that is, not only to resolve labour relations conflicts, but to

resolve them in an expeditious manner. Our conclusion in this regard is reinforced by the possibility of other forums where these issues can be canvassed.

18. Naturally, we are not unmoved by the respondents' view that our particular labour relations expertise is important in determining the conflict of interest motion. There is no doubt that the issue of the identity of the client when a lawyer is counsel on a grievance under a collective agreement is one which may be coloured by the traditional background and specific culture of labour relations and labour law. However, it is also clear that other bodies such as the Law Society and the courts have their own specific expertise in matters such as the professional conduct of lawyers, and that it is possible for counsel to acquaint them with the climate and circumstances of the labour relations community. In any event, this alone would not persuade us to entertain matters which have a significant potential for interfering with the expeditious resolution of our cases.

19. For these reasons, if we have the jurisdiction to entertain this kind of motion, we decided that we had the discretion not to do so, and we exercised it accordingly.

COURT PROCEEDINGS

0101-87-R (Court File No. 206/88) Genspec Construction Incorporated, Applicant v. United Brotherhood of Carpenters & Joiners of America, Local Union 27 and Ontario Labour Relations Board, Respondents

Bargaining Unit - Certification - Construction Industry - Employee - Judicial Review - Practice and Procedure - Board using tests in *Gilvesy* and *E & E Seegmiller* to determine whether persons should be included in the bargaining unit for purposes of "the count" - Employee included in unit because majority of his working time on date of application spent performing carpentry work - Certificates issuing - Employer bringing application for judicial review on the grounds that, *inter alia,* the Board erred in considering the type of work performed by employees solely on the application date as opposed to a more representative period - Judicial review dismissed by Divisional Court

Board decision February 3, 1988 (unreported).

High Court of Justice, Divisional Court, Reid, Steele, and Lane JJ., April 18, 1990:

Reid J.: This application is dismissed. Notwithstanding Ms. Oughtred's able argument we are not persuaded that the Board erred in any way that would justify the intervention of this court. Costs to respondent union.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1354-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. DJ's Nepean Taxi Company Ltd. (Respondent) v. Denis Cadieux, Edgar Bray, Greg Claydon, Larry Holmes, Ameche Scott & Brian Shearon (Interveners)

Unit: "all employees of the respondent in the Cities of Nepean and Kanata, save and except dispatchers, persons above the rank of dispatcher, call takers, office and clerical staff, multi-car/multi-plate owner/lessees, limo drivers, and persons for whom any trade union held bargaining rights on August 29, 1989" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1611-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. G. M. Finishing Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1948-89-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Beatrice Foods Inc. (Respondent)

Unit: "all employees of the respondent at Aylmer, save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

2035-89-R: United Steelworkers of America (Applicant) v. 736044 Ontario Inc., c.o.b. as A & A Metal Cleaning & Stripping (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Chatham, save and except forepersons, persons above the rank of foreperson, office clerical and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

2492-89-R: Canadian Union of Public Employees (Applicant) v. Centre des Services de developpement pour Stormont, Dundas et Glengarry (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except supervisors, persons above the rank of supervisor, secretary to the executive director, payroll/personnel clerk, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*)

2510-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 496458 Ontario Ltd. o/a Journey's End Motel, London I. (Respondent)

Unit #1: "all employees of the respondent in London, save and except Assistant Manager, persons above the rank of Assistant Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in London, save and except Assistant Manager, persons above the rank of Assistant Manager, office and Clerical staff" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2511-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 567356 Ontario Inc. c.o.b. as Fisher St. IGA (Respondent)

Unit: "all employees of the respondent in the City of North Bay, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, Head Cashier, office and clerical staff and Meat Department employees regularly employed for more than 24 hours per week" (54 employees in unit) (*Having regard to the agreement of the parties*)

2512-89-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. 567356 Ontario Inc. c.o.b. as Fisher St. IGA (Respondent)

Unit: "all employees of the respondent in the City of North Bay employed in the Meat Department, save and except Meat Manager, persons above the rank of Meat Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

2544-89-R: Sudbury Mine, Mill & Smelter Workers' Union, Local 598 of the Canadian Union of Mine, Mill & Smelter Workers (Applicant) v. Crisis Housing Liaison (Sudbury) Inc. (Respondent)

Unit: "all employees of the respondent in the City of Sudbury" (4 employees in unit) (*Having regard to the agreement of the parties*)

2565-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Goldlist Construction Ltd. (Respondent)

Unit: "all employees of the respondent at 3665 Arista Way and 1423 Mississauga Valley Blvd., in the City of Mississauga, engaged in cleaning and maintenance, including resident superintendent and excluding property manager, office and clerical staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

2590-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Dadcon Construction Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 785 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the County of Dufferin, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), the County of Wellington, the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2603-89-R: Canadian Union of Public Employees (Applicant) v. The Bruce-Grey County Roman Catholic Separate School Board (Respondent)

Unit: "all employees of the respondent in Bruce and Grey Counties employed as speech and language pathol-

ogists, psychometrists and social workers, save and except supervisors, persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

2612-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. GCIU-CPI Benefits Administration Corporation (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Mississauga, save and except assistant administrator, persons above the rank of assistant administrator" (6 employees in unit) (*Having regard to the agreement of the parties*)

2617-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Dadcon Construction Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Dufferin, the County of Wellington, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2626-89-R: Amalgamated Transit Union, Local 966 (Applicant) v. H.A.G.I. Transit Inc. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

2630-89-R: Energy & Chemical Workers Union (Applicant) v. National Sanitation & Supply Company Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office and sales staff" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in the City of Peterborough save and except supervisors, persons above the rank of supervisor and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2637-89-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Matthews Pipeline Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. Labourers' International Union of North America, Local 493 (Intervener #2)

Unit: "all Teamsters engaged in on site construction in the employ of the respondent in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Having regard to the agreement of the parties*)

2649-89-R: Retail, Wholesale & Department Store Union, (Applicant) v. Burk's Falls Fresh Mart Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Armour, save and except assistant store manager, persons above the rank of assistant store manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

2667-89-R: Canadian Union of Public Employees (Applicant) v. St. Joseph Nursing Home (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in Rockland, save and except professional medical staff, graduate nursing staff, undergraduate nursing staff, supervisors and persons above the rank of supervisor, technical and office staff" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2673-89-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Goody Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (75 employees in unit) (*Having regard to the agreement of the parties*)

2676-89-R: Retail, Wholesale & Department Store Union (Applicant) v. T. Breen Distributor (1984) Inc. (Respondent)

Unit: "all employees of the respondent working at and out of the Town of Elliott Lake, and the Town of Espanola, save and except foremen, persons above the rank of foreman, and office staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

2679-89-R: United Steelworkers of America (Applicant) v. Ajax Material Handling Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Kargo Waste Equipment division in the Town of Whitby, save and except forepersons, persons above the rank of foreperson and office, clerical and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

2684-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Canshare Cabling Inc. (Respondent)

Unit: "all employees of the respondent working at and out of Town of Markham, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and sales staff, students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

2685-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Arosan Enterprises Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2695-89-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Women's Centre (Grey & Bruce) Inc. (Respondent)

Unit #1: "all employees of the respondent in the City of Owen Sound, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Owen Sound regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

2736-89-R: Energy & Chemical Workers Union (Applicant) v. Carters Welding Supplies Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Hamilton, save and except supervisors, persons

above the rank of supervisor, clerical staff, outside staff and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Burlington, save and except supervisors, persons above the rank of supervisor, clerical staff, outside staff and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

2741-89-R: Retail, Wholesale & Department Store Union, (Applicant) v. Burk's Falls Fresh Mart Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Armour regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant store manager, persons above the rank of assistant store manager and office staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

2745-89-R: Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 880 (Applicant) v. The Corporation of the Township of Romney (Respondent)

Unit: "all employees of the respondent in the Township of Romney, save and except the clerk/treasurers and persons above the rank of clerk/treasurer" (4 employees in unit) (*Having regard to the agreement of the parties*)

2750-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Solell Homes Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2764-89-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Joseph's Hospital Auxiliary (Respondent)

Unit #1: "all employees of the respondent in the City of London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week" (13 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of London regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*)

2767-89-R: United Steelworkers of America (Applicant) v. Occupational Health Clinic for Ontario Workers (Hamilton) Inc. (Respondent)

Unit: "all employees of the respondent in the City of Hamilton" (6 employees in unit) (*Having regard to the agreement of the parties*)

2775-89-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Hurley Brothers Ltd. (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance at the Manulife Centre, 55 Bloor Street West, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

2777-89-R: United Steelworkers of America (Applicant) v. Camco Inc. (Respondent)

Unit: "all employees of the respondent in the City of Kitchener, save and except Branch Manager, persons above the rank of Branch Manager and all employees for whom any trade union holds bargaining rights as of February 13, 1990" (5 employees in unit) (*Having regard to the agreement of the parties*)

2794-89-R: International Union of Plant Guard Workers of America, Local 1962 (Applicant) v. St. Joseph's Hospital (Respondent)

Unit: "all security guards employed by the respondent in the City of Hamilton regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

2795-89-R: International Union of Plant Guard Workers of America, Local 1962 (Applicant) v. St. Joseph's Hospital (Respondent)

Unit: "all security guards employed by the respondent in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

2799-89-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Jomara Trim Centre (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2801-89-R: Canadian Union of Public Employees (Applicant) v. Hearst Public Utilities Commission (Respondent)

Unit: "all employees of the respondent in the Town of Hearst, save and except foremen, persons above the rank of foreman, office and clerical staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

2830-89-R: Service Employees' Union, Local 210, affiliated with Service Employees International Union, AFL:CIO:CLC: (Applicant) v. The Religious Hospitallers of St. Joseph of Villa Maria, Windsor, Ontario (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

2831-89-R: Canadian Union of Public Employees (Applicant) v. The Hastings-Prince Edward County Roman Catholic Separate School Board (Respondent)

Unit #1: (see *Applications for Certification Dismissed Without Vote*)

Unit #2: "all office, clerical and technical employees of the respondent in the County of Hastings and in the County of Prince Edward, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Transportation Officer, Payroll Supervisor, Comptroller of Plant and Maintenance, secretary to the Director of Education, secretary to the Superintendent of Business and employees in bargaining units for which any trade union held bargaining rights as of February 16, 1990" (9 employees in unit) (*Having regard to the agreement of the parties*)

2840-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Cliff & Walters Lithographing Co. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Richmond Hill, save and except sales staff, office and clerical staff, non-working foremen, those above the rank of non-working foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

2862-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Connor's Eastown Chevrolet Oldsmobile Ltd. (Respondent)

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, service advisors, the tower operator, the cashier, the cafeteria attendant, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (44 employees in unit) (*Having regard to the agreement of the parties*)

2866-89-R: Teamsters Local Union No. 879 (Applicant) v. Jenc Transit Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Hamilton, save and except supervisors, those above the rank of supervisor, office, and sales staff, persons not regularly employed for more than 24 hours per week and students employed during the school vacation period" (56 employees in unit) (*Having regard to the agreement of the parties*)

2870-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Haldimand-Norfolk Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Haldimand-Norfolk, save and except office manager (Superintendent of Business), persons above the rank of office manager (Superintendent of Business), accountant, Secretary to the Superintendent of Personnel, Secretary to the Superintendent of Business, Secretary to the Director of Education and the Assistant Secretary to the Director" (16 employees in unit) (*Having regard to the agreement of the parties*)

2871-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Haldimand-Norfolk Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit: "all teacher aides and health care aides of the respondent in the Regional Municipality of Haldimand-Norfolk, save and except superintendent of Personnel and person above the rank of Superintendent of Personnel" (14 employees in unit) (*Having regard to the agreement of the parties*)

2894-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Galrich Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2943-89-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Bennett & Wright Limited (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers' apprentices in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk

coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2950-89-R: Canadian Union of Public Employees (Applicant) v. Toronto Humane Society (Respondent) v. Group of Employees (Objectors)

Unit #1: "all office, clerical and technical employees of the respondent in Toronto, save and except executive assistant to the Executive Director, supervisors, persons above the rank of supervisors, veterinarians, persons in bargaining units for whom any trade union held bargaining rights as of February 23, 1990, employees employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all office, clerical and technical employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the executive assistant to the Executive Director, supervisors, persons above the rank of supervisors, veterinarians and persons in bargaining units for whom any trade union held bargaining rights as of February 23, 1990" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2973-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Lock-Wood Ltd. (Respondent)

Unit: "all employees of the respondent in Newmarket, Ontario, save and except forepersons, persons above the rank of foreperson, office, and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2352-89-R: Canadian Paperworkers Union (Applicant) v. Grant Industries Corp. and Grant Forest Products Corp. c.o.b. as Grant Forest Products (Respondent) v. Grant Forest Products Employee's Association (Intervener)

Unit: "all employees of the respondent in the Town of Englehart, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (203 employees in unit)

Voting Constituency #1: "all employees engaged in the plants and yard of the Company's operations at Englehart, save and except foremen, those above the rank of foremen, office, clerical, sales staff, students, or any salaried, part-time or temporary employees"

Number of names of persons on list as originally prepared by employer	203
Number of persons who cast ballots	186
Number of ballots marked in favour of applicant	169
Number of ballots marked in favour of intervener	17

Voting Constituency #2: "all employees of the respondent in the Town of Englehart, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and those employed in voting constituency #2"

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

2686-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. S.W. Fleming Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 540 (Intervener)

Unit: "all hourly rated employees of the company in the Ajax plant, save and except foremen, persons above

the rank of foreman, supervisors, maintenance staff, inspection staff, office staff, draftsmen and engineering staff" (66 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	66
Number of persons who cast ballots	59
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	58
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	51
Number of ballots marked in favour of intervener	6
Ballots segregated and not counted	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2274-89-R: Ontario Catholic Occasional Teacher's Association (Applicant) v. Kent County Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in the County of Kent, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (95 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	95
Number of persons who cast ballots	26
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	25
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	4
Ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

1151-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Colonial Woods Developments Inc. and Colonial Woods Homes (East) Inc. (Respondents) v. Group of Employees (Objectors) (5 employees in unit)

1582-89-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 928 (Applicant) v. Norstar Entertainment Inc. and P.N. III Productions Inc. (Respondents) v. Directors Guild of Canada Inc./La Guilde Canadienne des Realisateurs Inc. (Intervener #1) v. ACTRA (Intervener #2) (3 employees in unit)

2289-89-R; 2290-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. D.J. Venasse Construction Ltd. (Respondent) (43 employees in unit)

2370-89-R: International Alliance of Theatrical Stage Employees & Motion Picture Machine Operators of the United States & Canada, Theatrical Wardrobe Union, Local 822 (Applicant) v. Opera Ghost Productions Inc. (Respondent) (16 employees in unit)

2831-89-R: Canadian Union of Public Employees (Applicant) v. The Hastings-Prince Edward County Roman Catholic Separate School Board (Respondent) (Unit #1) (41 employees in unit)

2864-89-R: Teamsters Local Union No. 879 (Applicant) v. Ferrell Builders Supply Ltd. (Respondent) v. Group of Employees (Objectors) (11 employees in unit)

2975-89-R: International Association of Machinists & Aerospace Workers (Applicant) v. Peacock Inc. (Respondent) v. Group of Employees (Objectors) (42 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2002-89-R: Christian Labour Association of Canada (Applicant) v. Babcock Nursing & Rest Homes Ltd. (Respondent)

Unit: "all employees of the respondent at its nursing home in Wardsville, save and except administrator, director of nursing, supervisors, persons above the rank of supervisor, registered and graduate nurses, activity director, office and clerical staff, and students working during the school vacation period" (66 employees in unit)

Number of names of persons on list as originally prepared by employer	66
Number of persons who cast ballots	62
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	47
Ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2277-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Set Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	16
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	15
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	13

Applications for Certification Withdrawn

1606-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Jordan Construction Management Inc. (Respondent)

1801-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Colautti Northern Developments Ltd. (Respondent)

1834-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 705008 Ontario Ltd, Sutherland-Schultz Ltd. (Respondents) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 599 and Ontario Pipe Trades Council (Intervener #1) v. Ontario Sheet Metal Workers' Conference; Sheet Metal Workers' International Association, Locals 473 and 562 (Intervener #2) v. International Brotherhood of Electrical Workers Construction Council of Ontario (Intervener #3) v. Millwright District Council of Ontario (Intervener #4)

2174-89-R: Transport Drivers, Warehousemen & General Workers, Local 106 (Teamsters) (Applicant) v. WMI Hull Ottawa (Respondent)

2516-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Brown & Root Ltd. (Respondent)

2550-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Bayview Woods (Respondent) v. Group of Employees (Objectors)

2574-89-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. Metro (Windsor) Catering Co. (Respondent)

2604-89-R: Canadian Union of Public Employees (Applicant) v. The Ottawa-Carleton French Language School Board (Catholic Sector) (Respondent)

2656-89-R: Syndicat des employés de Modern Window, (requérant) contre Modern Window H. Inc. (intimé)

2742-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. J&D Caulking, Benkei Enterprises (Respondents) v. Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Intervener)

2747-89-R: The Independent Canadian Transit Union (Applicant) v. The Riverside Hospital of Ottawa (Respondent) v. The Canadian Union of Operating Engineers & General Workers (Intervener)

2893-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Sheraton Armouries Hotel London (Respondent)

2997-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Dafoe Floor (London) Ltd. (Respondent)

3000-89-R: Labourers' International Union of North America (Applicant) v. Olympia & York Developments Ltd. (Respondents)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0670-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 440 (Applicant) v. Arrow Laundry of Chatham, Highlander Cleaners, Safaire Enterprises, Maple City Laundry & Dry Cleaners Ltd. (Respondents) (*Withdrawn*)

0671-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 440 (Applicant) v. Arrow Laundry of Chatham, Highlander Cleaners, Safaire Enterprises (Respondents) (*Withdrawn*)

1354-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. DJ's Nepean Taxi Company Ltd. (Respondent) v. Denis Cadieux, Edgar Bray, Greg Claydon, Larry Holmes, Ameche Scott and Brian Shearon (Interveners) (*Granted*)

1663-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ferma Concrete & Paving Ltd., Ferma Concrete & Paving (1988) Ltd., Ferma Construction Company Inc., Malton Construction Ltd. (Respondents) (*Granted*)

1870-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Yola Construction Ltd. and K & Z Construction Ltd. (Respondents) (*Dismissed*)

1871-89-R: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Yola Construction Ltd. and K & Z Construction Ltd. (Respondents) (*Dismissed*)

1930-89-R: International Ladies' Garment Workers Union & Ontario Cloakmakers, Dress & Sportswear District Council of the International Ladies' Garment Workers Union (Applicants) v. Briston Fashions Inc. and Jay Garment Manufacturing Co. Ltd. (Respondents) (*Granted*)

1931-89-R: Sheet Metal Workers' International Association, Local 504 (Applicant) v. Lorlee Roofing Ltd., and M. C. Lepper Ltd. (Respondents) (*Withdrawn*)

2335-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Humbelco Corporation, 834996 Ontario Ltd. c.o.b. as 3H International (Respondents) (*Granted*)

2468-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Machinery Movers Ltd.; Windsor Crane Inc.; Windsor Crane Rentals Ltd. (Respondents) (*Withdrawn*)

2780-89-R: Ontario Public Service Employees Union (Applicant) v. Larch Radiological Services Ltd. and Cambrian Radiological Services Ltd. and Northern Radiological Services Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0670-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 440 (Applicant) v. Arrow Laundry of Chatham, Highlander Cleaners, Safaire Enterprises, Maple City Laundry & Dry Cleaners Ltd. (Respondents) (*Withdrawn*)

0671-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 440 (Applicant) v. Arrow Laundry of Chatham, Highlander Cleaners, Safaire Enterprises (Respondents) (*Withdrawn*)

1663-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ferma Concrete & Paving Ltd., Ferma Concrete & Paving (1988) Ltd., Ferma Construction Company Inc., Malton Construction Ltd. (Respondents) (*Granted*)

1705-89-R: Service Employees Union, Local 210 (Applicant) v. Spata Developments Inc. (Respondent) (*Dismissed*)

1786-89-R: Canadian Union of Public Employees, Local 2274 (Full-time Collective Bargaining Agreement) (Applicant) v. The Religious Hospitallers of St. Joseph Health Centre, Cornwall, Ontario (Respondent) v. Ontario Public Service Employees Union (Intervener) (*Granted*)

1787-89-R: Canadian Union of Public Employees, Local 2274 (Full-time Collective Bargaining Agreement) (Applicant) v. The Religious Hospitallers of St. Joseph Health Centre, Cornwall, Ontario (Respondent) (*Granted*)

1870-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Yola Construction Ltd. and K & Z Construction Ltd. (Respondents) (*Dismissed*)

1871-89-R: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Yola Construction Ltd. and K & Z Construction Ltd. (Respondents) (*Dismissed*)

1930-89-R: International Ladies' Garment Workers Union & Ontario Cloakmakers, Dress & Sportswear District Council of the International Ladies' Garment Workers Union (Applicants) v. Briston Fashions Inc. and Jay Garment Manufacturing Co. Ltd. (Respondents) (*Granted*)

1931-89-R: Sheet Metal Workers' International Association, Local 504 (Applicant) v. Lorlee Roofing Ltd., and M. C. Lepper Ltd. (Respondents) (*Withdrawn*)

2335-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Humbelco Corporation, 834996 Ontario Ltd. c.o.b. as 3H International (Respondents) (*Withdrawn*)

2468-89-R; 2469-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Machinery Movers Ltd.; Windsor Crane Inc.; Windsor Crane Rentals Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2320-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees-Canadian Labour Congress, Local 2104 (Respondent) v. Ottawa Community Credit Union Ltd. (Employer) (*Granted*)

2321-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees-Canadian Labour Congress, Local 2104 (Respondent) v. Heritage Credit Union Inc. (Employer) (*Granted*)

2322-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees, Canadian Labour Congress, Local 2104 (Respondent) v. Cornwall Community Credit Union Ltd. (Employer) (*Granted*)

2323-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees-Canadian Labour Congress, Local 2104 (Respondent) v. Airline (Malton) Credit Union Ltd. (Employer) (*Granted*)

2324-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees-Canadian Labour Congress, Local 2104 (Respondent) v. Welland Area Civic Employees Credit Union (Employer) (*Granted*)

2325-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees-Canadian Labour Congress, Local 2104 (Respondent) v. Howard Smith (Cornwall) Credit Union Ltd. (Employer) (*Granted*)

2326-89-R: United Steelworkers of America (Applicant) v. Union of Bank Employees, Local 2104 (Ontario) CLC (Respondent) v. Brant Community Credit Union Ltd. (Employer) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1915-88-R; 1916-88-R; 1917-88-R: Sandra Taylor (Applicant) v. United Food & Commercial Workers International Union, Local 633 (Respondent) v. Thorlold I.G.A. Market (Intervener) v. Group of Employees (Objectors) (*Dismissed*)

1514-89-R: Robert A. Wallace (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Town of Palmerston (Intervener)

Unit: "all outside employees of the Corporation of the Town of Palmerston, in the Town of Palmerston, save and except foremen, persons above the rank of foreman, office, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

1856-89-R: Royce Duponte Poultry Packers Employees (Applicant) v. United Food & Commercial Workers International Union, Local 175/633 (Respondent) (*Withdrawn*)

2236-89-R: Gail Stewart (Applicant) v. United Steelworkers of America (Respondent) v. Terra Footwear Ltd. (Intervener)

Unit: "all its employees working in Markdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period" (79 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	73
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	72

Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	12
Number of ballots marked against respondent	60
Ballots segregated and not counted	1

2237-89-R: Janice Croft (Applicant) v. United Steelworkers of America (Respondent) v. Terra Footwear Ltd. (Intervener)

Unit: "all office employees working in Markdale, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff, students employed during the school vacation period, payroll supervisor, Industrial Engineer, and purchasing agent" (77 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	73
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	72
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	12
Number of ballots marked against respondent	60
Ballots segregated and not counted	1

2396-89-R: Gary J. Colclough (Applicant) v. Canadian Paperworkers Union and its Local 333 (Respondent) v. Paperboard Industries Corporation (Intervener)

Unit: "all employees of the intervener in Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

2598-89-R: Gerard Harte (Applicant) v. United Steelworkers of America, Local 8900 (Respondent) v. Burnstein Castings Ltd. (Intervener) (*Dismissed*)

2758-89-R: Robert Gittins (Applicant) v. Draftsmen's Association of Ontario International Federation of Professional & Technical Engineers (Respondent) v. Schindler Elevator Corporation (Intervener) (*Dismissed*)

2826-89-R: Wayne Marchand (Applicant) v. Local 802 United Brotherhood of Carpenters & Joiners of America (Respondent) v. Windsor Drywall (Windsor) Inc. (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3131-89-U: Fedders Inc. (Applicant) v. United Electrical, Radio & Machine Workers of Canada, Local 553 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0729-86-U: The Electrical Power Systems Construction Association, Ontario Hydro & Gilbert Steel Ltd. (Applicants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, George Joncas, Alfie Thomas, and Aaron Murphy, on their own behalf and on behalf of the respondent union (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2993-88-U: Service Employees Union, Local 210 (Complainant) v. Security Building (Windsor) Ltd., Sifton Properties Ltd. and 809746 Ontario Ltd. (Respondents) (*Dismissed*)

0354-89-U: The Society of Ontario Hydro Professional & Administrative Employees, (Complainant) v. Ontario Hydro (Respondent) v. The Coalition to stop the certification of the Society, on behalf of certain employees (Intervener) (*Dismissed*)

1126-89-U: Hotel Employees Restaurant Employees Union Local 75, (Complainant) v. Crysalis Restaurant Enterprises Inc. c.o.b. Bemelmans Restaurant (Respondent) (*Withdrawn*)

1644-89-U: Ted Stothers and Bruce Skreptak (Complainants) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 128 (Respondent) v. Hydra-Dyne Industrial Cleaning Services Ltd. (Intervener) (*Dismissed*)

1688-89-U: David Connell (Complainant) v. Kruger Inc. and Canadian Paperworkers Union (Respondent) (*Dismissed*)

1692-89-U: International Brotherhood of Electrical Workers, Local 1739 (Complainant) v. Gilmar Electric Inc. (Respondent) (*Withdrawn*)

1713-89-U; 2262-89-U: Jane R. Marks (Complainant) v. Ontario Nurses Association (Respondent) (*Withdrawn*)

1805-89-U: Mauricio Garcia (Complainant) v. Welded Tube of Canada Limited and United Steelworkers of America, Local 8328 (Respondents) (*Dismissed*)

1924-89-U: Frank Gates (Complainant) v. H. J. Heinz Company of Canada Ltd., United Food & Commercial Workers Union, Local 459 (Respondents) (*Dismissed*)

1965-89-U: John Christensen (Complainant) v. C. Losier President Schneider Employees Association (Respondent) (*Withdrawn*)

1977-89-U: David Hendershot (Complainant) v. Local 528 S.E.I.U. (Respondent) (*Withdrawn*)

2062-89-U: Norman Bonk (Complainant) v. Canadian Paperworkers Union, Local 89 (Respondent) (*Withdrawn*)

2088-89-U: Mr. Agostino Fiore (Complainant) v. United Steel Workers of America, Local 2251 (Respondent) (*Withdrawn*)

2111-89-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Ably Concrete Floor Ltd. (Respondent) (*Withdrawn*)

2144-89-U: United Steelworkers of America (Complainant) v. Placer Dome Inc. - Dona Lake Mine (Respondent) (*Withdrawn*)

2145-89-U: United Steelworkers of America (Complainant) v. 736044 Ontario Inc., c.o.b. as A & A Metal Cleaning & Stripping (Respondent) (*Withdrawn*)

2239-86-U: The Electrical Power Systems Construction Association and Ontario Hydro and Gilbert Steel Limited (Complainants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, George Joncas, Alfie Thomas, John Donaldson and Aaron Murphy (Respondents) (*Dismissed*)

2309-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Northside Dairy (Respondent) (*Dismissed*)

2315-89-U: Gael Koob (Complainant) v. Janet Walker (Respondent) (*Withdrawn*)

2346-89-U: Teamsters Local 230, Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of Teamsters (Complainant) v. Gormley Ready Mix (a division of Gormley Aggregates Ltd.) (Respondent) (*Withdrawn*)

2363-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Cedarcrest Nursing Home (Respondent) (*Withdrawn*)

2365-89-U: Rudy Marinac (Complainant) v. Dennis Patterson, Ed Herechuk and Steve Mann (Respondents) (*Withdrawn*)

2384-89-U: Harmandeep K. Gill (Complainant) v. Sealy Upholstery Ana Union (Respondents) (*Dismissed*)

2392-89-U: John Elphage (Complainant) v. Laborer Intl. Union (Respondent) (*Withdrawn*)

2429-89-U: Niagara Health Care & Service Workers Union, Local 302 Affiliated with the Christian Labour Association of Canada (Complainant) v. Cavendish Manor Retirement Home (Respondent) (*Withdrawn*)

2431-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. 763998 Ontario Inc. c.o.b. as Mann's EMA Foods (Respondent) (*Withdrawn*)

2454-89-U: Linda Bell (Complainant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Dismissed*)

2459-89-U: Service Employees' Union, Local 210 (Complainant) v. The Windsor Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

2460-89-U: Fred J. Zicard (Complainant) v. United Steelworkers of America, Local 3749 (Respondent) v. Stelco Fastener & Forging Co., Stelco Inc., (Intervener) (*Dismissed*)

2463-89-U: London & District Service Workers' Union, Local 220 (Complainant) v. Pinehill Cottage, St. Thomas (Respondent) (*Withdrawn*)

2481-89-U: Gajjan Singh Bath (Complainant) v. United Steelworkers of America, Local 6727 (Respondent) (*Dismissed*)

2513-89-U: Cecil Wilson (Complainant) v. Sam Schouten (Teamsters Local 938) (Respondent) (*Withdrawn*)

2547-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Blue Line Taxi Co. Ltd./Alpha Taxi (Respondent) (*Withdrawn*)

2587-89-U: United Food & Commercial Workers International Union, Local 633 (Complainant) v. Blue Mountain I.G.A. (Respondent) (*Withdrawn*)

2593-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. U-Need-A-Cab Ltd. (Respondent) (*Withdrawn*)

2595-89-U: Annette Joanne Frances Graydon (Complainant) v. Laidlaw Transit Ltd. (Respondent) (*Withdrawn*)

2608-89-U: Labourers' International Union of North America, Local 506 (Complainant) v. G.D. Hanna Inc. (Respondent) (*Withdrawn*)

2610-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Acmetrack Ltd. (Respondent) (*Withdrawn*)

2611-89-U: Christian Labour Association of Canada (Complainant) v. Gateway Residence of Niagara Inc. (Respondent) (*Withdrawn*)

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A Monthly Series of Decisions from the Ontario Labour Relations Board

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Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers - Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as "agent" for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute

FOUNDATION COMPANY OF CANADA LIMITED; RE B.S.O.I.W., LOCAL UNION 721; RE L.I.U.N.A., LOCAL 506; RE DURON ONTARIO LTD. 521

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board exercising its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

E.S. FOX LIMITED, PRO INSUL LIMITED, S.M.W., LOCAL 562; RE H.F.I.A., LOCAL 95; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP; RE MASTER INSULATORS' ASSOCIATION OF ONTARIO INC. 504

Construction Industry - Construction Industry Grievance - Parties - Whether employers' organizations which are constituents of an employer bargaining agency are parties to construction industry referrals - No right to standing under Act - Board also rejecting right to party standing based on argument that their legal rights are affected by issue to be arbitrated - Issue is whether general contractors are bound to trade appendices to the collective agreement or only to local union schedules - No legal right to participate found in collective agreement - No special circumstances leading Board to exercise its discretion to give employers' organizations standing - Union local not entitled to standing - Union's interest akin to that of a commercial interest - Merits of grievance to be set down for hearing

JADDCO E. ANDERSON LTD.; RE L.I.U.N.A., LOCAL 1036 570

Construction Industry - Construction Industry Grievance - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not

covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed

FOUR SEASONS DRYWALL; RE L.I.U.N.A., LOCAL 506 525

Construction Industry - Parties - Practice and Procedure - Termination - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice

D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., LOCAL 785, AND THE ONTARIO PROVINCIAL COUNCIL; RE MICHAEL PARKER; RE L.I.U.N.A., LOCAL 1081, AND ONTARIO PROVINCIAL DISTRICT COUNCIL..... 503

Construction Industry Grievance - Construction Industry - Collective agreement requiring employers to make remittances to union's benefit fund for purchase of, amongst other things, OHIP - *Employer Health Tax Act* imposing tax on employers and eliminating the payment of OHIP premiums -Whether employers are relieved from the obligation to make payments to the fund which are referable to OHIP premiums - Doctrines of frustration and unjust enrichment not applicable - Employers not entitled to abatement of their obligation to make remittances in full

HALTON FORMING LTD., THE RESIDENTIAL LOW-RISE FORMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY AND; RE L.I.U.N.A., LOCAL 183; RE MUR-WAL FORMING INC.; RE ORTA FORMING & CONST. LIMITED; RE PARKWALL FORMING LTD.; RE TESKEY CONSTRUCTION CO. LTD.; RE MALNIC CONTRACTING INC.; RE BACCARDI FOUNDATIONS LTD.; RE A.R.G. CONSTRUCTION CORPORATION; RE CEDAR FORMING LIMITED; RE GREENWALL FORMING LIMITED; RE PEEL FORMING LIMITED; RE POURED WALL CORP. LTD.; RE TORONTO ZENITH CONTRACTING (1982) LTD.; RE TRU-WALL GROUP LIMITED..... 553

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers - Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as "agent" for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute

FOUNDATION COMPANY OF CANADA LIMITED; RE B.S.O.I.W., LOCAL UNION 721; RE L.I.U.N.A., LOCAL 506; RE DURON ONTARIO LTD. 521

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board exercising its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

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Construction Industry Grievance - Construction Industry - Parties - Whether employers' organi-

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JADDCO E. ANDERSON LTD.; RE L.I.U.N.A., LOCAL 1036 570

Construction Industry Grievance - Construction Industry - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed

FOUR SEASONS DRYWALL; RE L.I.U.N.A., LOCAL 506 525

Damages - Duty to Bargain in Good Faith - Unfair Labour Practice - Employer failing during collective bargaining to disclose to the union its intention to shut down one of its turbines - Breach of bargaining duty - Union claiming damages for loss of opportunity to negotiate with respect to the impact of the shut down, higher rate of pay for remaining employees, and expenses incurred by union in enforcing its rights - Insufficient evidence before Board to substantiate any compensatory relief

CANADIAN PACIFIC FOREST PRODUCTS LIMITED; RE LOCAL 865, I.U.O.E. 492

Duty of Fair Representation - Settlement - Unfair Labour Practice - Complainant registered nurse terminated after he refused to submit to a psychiatric examination - Arbitration of complainant's grievance scheduled but settlement reached beforehand - Complainant signing settlement - Complainant arguing before Board that he was under improper pressure to accept settlement and its terms were unfair - Fair representation complaint against union dismissed

LEONARD, DENNIS; RE O.N.A.; RE MOUNT SINAI HOSPITAL 575

Duty of Fair Representation - Unfair Labour Practice - Failure of union to seek judicial review of arbitral award which dismissed complainant's discharge grievance not breach of fair representation duty

SINGH, PROFESSOR UDAY; RE LAURENTIAN UNIVERSITY FACULTY ASSOCIATION 621

Duty to Bargain in Good Faith - Damages - Unfair Labour Practice - Employer failing during collective bargaining to disclose to the union its intention to shut down one of its turbines - Breach of bargaining duty - Union claiming damages for loss of opportunity to negotiate with respect to the impact of the shut down, higher rate of pay for remaining employees, and expenses incurred by union in enforcing its rights - Insufficient evidence before Board to substantiate any compensatory relief

CANADIAN PACIFIC FOREST PRODUCTS LIMITED; RE LOCAL 865, I.U.O.E. 492

Evidence - Adjournment - Judicial Review - Jurisdictional Dispute - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status

issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089 630

First Contract Arbitration - Collective Agreement - Interest Arbitration - Employer in business of preparing and packaging soils and fertilizers - Board determining wage schedule in first collective agreement - Employer's proposal for a two-tier wage structure inappropriate

HILLVIEW FARMS LIMITED; RE U.F.C.W., LOCAL 1000A 564

First Contract Arbitration - Employer's proposal to take three employees out of bargaining unit and initial refusal to provide negotiating data indicating refusal to recognize union's bargaining authority - Employer's wage proposal of only one wage rate at a level of the lowest rate being paid to employees constituting uncompromising proposal without reasonable justification - Process of bargaining found to be unsuccessful even though only two bargaining sessions held - Inexperience of employer's negotiator not a mitigating factor - Board directing the settlement of a first collective agreement by arbitration

PEACOCK LUMBER LIMITED; RE R.W.D.S.U., AFL:CIO:CLC: 584

First Contract Arbitration - Practice and Procedure - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.; RE RANDY BURKE 625

Interest Arbitration - Collective Agreement - First Contract Arbitration - Employer in business of preparing and packaging soils and fertilizers - Board determining wage schedule in first collective agreement - Employer's proposal for a two-tier wage structure inappropriate

HILLVIEW FARMS LIMITED; RE U.F.C.W., LOCAL 1000A 564

Interference in Trade Unions - Bargaining Rights - Related Employer - Remedies - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to

exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA 592

Interference in Trade Unions - Build-Up - Certification - Intimidation and Coercion - Membership Evidence - Petition - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES 535

Intimidation and Coercion - Build-Up - Certification - Interference in Trade Unions - Membership Evidence - Petition - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES 535

Intimidation and Coercion - Certification - Construction Industry - Membership Evidence - Unfair Labour Practice - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing

CUNEO INTERIORS; RE C.J.A., LOCAL 27 499

Judicial Review - Adjournment - Evidence - Jurisdictional Dispute - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089 630

Jurisdictional Dispute - Adjournment - Evidence - Judicial Review - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

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Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers -Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as "agent" for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute

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Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn -Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board exercising its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

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Membership Evidence - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Petition - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

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Membership Evidence - Certification - Construction Industry - Intimidation and Coercion - Unfair Labour Practice - Employer alleging that union's membership evidence was

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JADDCO E. ANDERSON LTD.; RE L.I.U.N.A., LOCAL 1036 570

Parties - Construction Industry - Practice and Procedure - Termination - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice

D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., LOCAL 785, AND THE ONTARIO PROVINCIAL COUNCIL; RE MICHAEL PARKER; RE L.I.U.N.A., LOCAL 1081, AND ONTARIO PROVINCIAL DISTRICT COUNCIL..... 503

Petition - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES 535

Petition - Certification - Practice and Procedure - Timeliness - Whether petition sent to the Board

on the terminal date by Priority Post timely - "Registered" mail including Priority Post - Petition timely

SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES 618

Practice and Procedure - Adjournment - Evidence - Judicial Review - Jurisdictional Dispute - Parties - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

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Practice and Procedure - Adjournment - On morning of hearing counsel advising Board by telephone that the parties were adjourning the matter *sine die* - Last minute adjournments can cause Board to incur unnecessary expenses and squander its resources - Parties who do not request an adjournment in a timely manner risk not being granted the adjournment

CANADA FRAMING, 560742 ONTARIO LTD. C.O.B.; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27; RE NORTH YORK CONSTRUCTION LTD. 490

Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Officer reporting back to Board on employee list problems - Respondent asking for hearing to make submissions on report but later requesting cancellation of hearing - Union opposing request - Hearing proceeding in absence of respondent - No valid reason for cancellation -Remaining issues in certification resolved by Board - Certificates issuing

B.J. LAVERTY CONSTRUCTION SEBRINGVILLE INC.; RE L.I.U.N.A., LOCAL 506 487

Practice and Procedure - Certification - Petition - Timeliness - Whether petition sent to the Board on the terminal date by Priority Post timely - "Registered" mail including Priority Post - Petition timely

SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES 618

Practice and Procedure - Certification - Trade Union - Six month bar imposed against local of union following unsuccessful representation vote - Parent union of local filing certification application 4 weeks later - Whether bar applies to parent union - Whether Board should exercise its discretion to decline to hear application - Application to be processed - Parent union a separate legal entity - Bar not applicable - No compelling reason to decline to entertain application

REPLA LIMITED; RE C.J.A. 612

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn -Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed -

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Practice and Procedure - Construction Industry - Parties - Termination - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice

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Practice and Procedure - First Contract Arbitration - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.; RE RANDY BURKE..... 625

Related Employer - Bargaining Rights - Interference in Trade Unions - Remedies - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA 592

Remedies - Bargaining Rights - Interference in Trade Unions - Related Employer - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope -Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor

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PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA 592

Representation Vote - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Petition - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES 535

School Boards and Teachers Collective Negotiations Act - Bargaining Unit - Certification - Union seeking a unit of occasional teachers only - School Board arguing unit should also include supply instructors - Board finding unit of occasional teachers only to be appropriate

HASTINGS COUNTY BOARD OF EDUCATION, THE; RE O.S.S.T.F. 560

Sector Determination - Construction Industry Grievance - Construction Industry - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed.

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Settlement - Duty of Fair Representation - Unfair Labour Practice - Complainant registered nurse terminated after he refused to submit to a psychiatric examination - Arbitration of complainant's grievance scheduled but settlement reached beforehand - Complainant signing settlement - Complainant arguing before Board that he was under improper pressure to accept settlement and its terms were unfair - Fair representation complaint against union dismissed

LEONARD, DENNIS; RE O.N.A.; RE MOUNT SINAI HOSPITAL 575

Termination - Construction Industry - Parties - Practice and Procedure - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice

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Termination - First Contract Arbitration - Practice and Procedure - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining

appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.; RE RANDY BURKE 625

Timeliness - Certification - Petition - Practice and Procedure - Whether petition sent to the Board on the terminal date by Priority Post timely - "Registered" mail including Priority Post - Petition timely

SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES 618

Trade Union - Certification - Practice and Procedure - Six month bar imposed against local of union following unsuccessful representation vote - Parent union of local filing certification application 4 weeks later - Whether bar applies to parent union - Whether Board should exercise its discretion to decline to hear application - Application to be processed - Parent union a separate legal entity - Bar not applicable - No compelling reason to decline to entertain application

REPLA LIMITED; RE C.J.A. 612

Unfair Labour Practice - Bargaining Rights - Interference in Trade Unions - Related Employer - Remedies - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA 592

Unfair Labour Practice - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Petition - Representation Vote - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

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Unfair Labour Practice - Certification - Construction Industry - Intimidation and Coercion - Membership Evidence - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing

CUNEO INTERIORS; RE C.J.A., LOCAL 27 499

Unfair Labour Practice - Damages - Duty to Bargain in Good Faith - Employer failing during collective bargaining to disclose to the union its intention to shut down one of its turbines - Breach of bargaining duty - Union claiming damages for loss of opportunity to negotiate with respect to the impact of the shut down, higher rate of pay for remaining employees, and expenses incurred by union in enforcing its rights - Insufficient evidence before Board to substantiate any compensatory relief

CANADIAN PACIFIC FOREST PRODUCTS LIMITED; RE LOCAL 865, I.U.O.E. 492

Unfair Labour Practice - Duty of Fair Representation - Failure of union to seek judicial review of arbitral award which dismissed complainant's discharge grievance not breach of fair representation duty

SINGH, PROFESSOR UDAY; RE LAURENTIAN UNIVERSITY FACULTY ASSOCIATION 621

Unfair Labour Practice - Duty of Fair Representation - Settlement - Complainant registered nurse terminated after he refused to submit to a psychiatric examination - Arbitration of complainant's grievance scheduled but settlement reached beforehand - Complainant signing settlement - Complainant arguing before Board that he was under improper pressure to accept settlement and its terms were unfair - Fair representation complaint against union dismissed

LEONARD, DENNIS; RE O.N.A.; RE MOUNT SINAI HOSPITAL 575

0734-89-R Labourers' International Union of North America Local 506, Applicant v. **B.J. Laverty Construction Sebringville Inc.,** Respondent

Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Officer reporting back to Board on employee list problems - Respondent asking for hearing to make submissions on report but later requesting cancellation of hearing - Union opposing request - Hearing proceeding in absence of respondent - No valid reason for cancellation -Remaining issues in certification resolved by Board - Certificates issuing

BEFORE: *Robert Herman,* Vice-Chair, and Board Members *R. M. Sloan* and *J. Redshaw.*

APPEARANCES: *Bernard Fishbein, J. Cabral* and *P. Treacy* for the applicant; no one appeared for the respondent.

DECISION OF THE BOARD; May 24, 1990

1. This is an application for certification pursuant to the construction industry provisions of the Act.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(*e*) shall be brought by either,
>
> (a) an employee bargaining agency; or
>
> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. Having regard to the agreement of the parties, the Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The applicant submitted four combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of $1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

6. In its application the applicant asserted that there were four employees in the bargaining unit at the relevant time. In its reply and the list of employees on the schedules filed by the respondent, the respondent asserted that there were 10 employees in the bargaining unit in question. Accordingly, because of the dispute over which employees fell within the bargaining unit, a Board Officer was appointed to inquire into the matter and report back to the Board. Both parties participated in the inquiry conducted by the Board Officer, and both were forwarded a copy of the Board Officer's Report.

7. The applicant forwarded its written submissions based upon the Report. The respondent similarly forwarded its written submissions, together with a request that a hearing be convened in order to entertain the oral submissions of the respondent. Accordingly, a hearing was scheduled and Notice of Hearing sent to the parties.

8. Approximately one week before the scheduled hearing, the respondent wrote to the Board indicating that it no longer was requesting a hearing to deal with the Officer's Report, and asking that the hearing already scheduled be cancelled. The applicant opposed this request and asked that the scheduled hearing continue. The parties were advised that, absent their consent to cancel the hearing, the hearing would not be cancelled by the Board solely because the respondent so requested.

9. At the hearing, the respondent did not appear. The Board proceeded with the hearing.

10. With respect to the written request of the respondent that the hearing be cancelled, the Board considered the written submissions of the parties. The Notice of Hearing sent to the parties indicates that the purpose of the hearing is "to hear the evidence and representations of the parties regarding the Labour Relations Officer's Report dated March 13, 1990, and on all outstanding issues with respect to the application for certification, construction industry." As the Notice of Hearing illustrates, the purpose of the hearing was not solely to deal with the Officer's Report. Indeed, the Board ruled upon the appropriate bargaining unit at the hearing. There were no grounds provided in the submissions of the respondent for cancellation of the hearing other than the ground that it no longer wished a hearing to be held on the issue of the Officer's Report. Once the hearing is scheduled by the Board as it was, then one party's request that it be cancelled, absent special reasons, is not cause to cancel the hearing. In the circumstances, there was no valid reason provided for the cancellation, and the Board accordingly ruled that the hearing would proceed.

11. The Board had the written submissions of both parties before it with respect to the Officer's Report and it took those written submissions into account. In addition, counsel for the applicant made oral submissions with respect to the challenges with respect to Noyes and Davis.

12. The parties ultimately agreed that Brian Marks should be excluded from the bargaining unit, as noted in the Officer's Report. Accordingly, the respondent's position was that there were nine employees in the bargaining unit, and the applicant's position was that there were only four.

13. The Board directed counsel for the applicant to first make submissions with respect to

whether Noyes and Davis fell within the bargaining unit. The applicant's position was that neither of these individuals was an employee of the respondent company.

14. Having regard to the evidence in the Officer's Report, and the submissions of the parties, the Board was satisfied that neither Noyes nor Davis were, as of the application date, employees of the respondent company and therefore they did not fall within the bargaining unit. It was apparently agreed between the parties that the evidence of Noyes would be representative of both individuals. Having regard to that evidence, another company on site, Sutherland & Schultz, placed ads for hiring workers, and representatives of Sutherland & Schultz both interviewed and hired Noyes and Davis. Both individuals then commenced working on the site for Sutherland & Schultz, and were paid by and supervised by Sutherland & Schultz. The respondent company had neither awareness of nor interaction with Noyes and Davis. On the application date, representatives of the applicant union attended at the site where they spoke to Noyes, who was at the time wearing a hard hat with the name Sutherland & Schultz on it. They asked Noyes if there was anybody on site working for the respondent company and Noyes replied in the negative. He was also asked if he was working for Sutherland & Schultz and he indicated that he was. At that point, as of the application date, Noyes had had no interaction whatsoever with the respondent company nor any communication from it. However, the respondent's evidence is that it and Sutherland & Schultz agreed between themselves that as of the day before the application date, both individuals would be transferred to the employ of the respondent company, with the result that their pay cheques would be paid by the respondent company.

15. Neither individual was informed of this arrangement at the time, nor asked for his consent to it. For some three to four weeks subsequent to the application date and this "transfer" of Noyes and Davis, they continued to be supervised by Sutherland & Schultz and there was no presence at all on site by the respondent company nor any interaction on site with personnel of the respondent. Any disciplinary action during this period would have had to have been effectively recommended by Sutherland & Schultz personnel.

16. The fact that these two individuals were apparently on the books of the respondent company as of the application date and their pay cheques as of that date were issued by the respondent company, does not lead to a conclusion that they were then employees of the respondent company. To the contrary, the evidence indicates that as of the application date these two individuals were employees of Sutherland & Schultz. They had been hired by that company, paid by it, supervised by it, and as far as they were concerned, continued to be employed by it. Even if their pay cheques were issued by the respondent for work on the application date, they did not thereby become employees of the respondent. Accordingly, neither Noyes nor Davis falls within the bargaining unit.

17. The applicant has filed membership support on behalf of 4 employees, and there are at most 7 employees in the bargaining unit. The Board is therefore satisfied on the basis of all the evidence before it that, regardless of the resolution of the other challenges, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 28, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

> ..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and

institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0095-89-R; 0249-89-R; 0250-89-R Labourers' International Union of North America, Local 183, Applicant v. 560742 Ontario Ltd. c.o.b. **Canada Framing,** Respondent v. United Brotherhood of Carpenters and Joiners of America, Local Union 27, Intervener; United Brotherhood of Carpenters and Joiners of America Local Union 27, Applicant v. Canada Framing and 560742 Ontario Limited and North York Construction Ltd., Respondent; United Brotherhood of Carpenters and Joiners of America Local Union 27, Applicant v. Canada Framing and 560742 Ontario Limited and North York Construction Ltd., Respondent v. Labourers' International Union of North America, Local 183, Intervener

Adjournment - Practice and Procedure - On morning of hearing counsel advising Board by telephone that the parties were adjourning the matter *sine die* - Last minute adjournments can cause Board to incur unnecessary expenses and squander its resources - Parties who do not request an adjournment in a timely manner risk not being granted the adjournment

BEFORE: *G. T. Surdykowski,* Vice-Chair, and Board Members *W. Gibson* and *P. V. Grasso.*

DECISION OF THE BOARD; May 9, 1990

1. Board File No. 0095-89-R is an application for certification in the construction industry in which a pre-hearing representation vote was requested. It was filed on April 13, 1989. Board File Nos. 0249-89-R and 0250-89-R are applications under section 63 and section 1(4) of the *Labour Relations Act* respectively. Both were filed on April 25, 1989.

2. By decision dated May 3, 1989, the Board (differently constituted in part) directed that the pre-hearing representation vote which had been requested be taken in accordance with the terms set out therein. That vote was held on May 18, 1989.

3. All three applications were scheduled to be heard together on November 22, 1989. By

letter dated and delivered November 17, 1989, counsel for the intervener advised the Board that the parties had agreed to adjourn the November 22, 1989 hearing. Subsequently, and in consultation with the parties, the applications were rescheduled to be heard on April 17, 1990.

4. Early in the morning of April 17, 1990, counsel for the applicant telephoned the Board to advise that the parties had agreed to adjourn the matter again. Counsel confirmed this by letter dated April 17, 1990 as follows:

> This is to advise that the hearing scheduled for April 17, 1990 in the above-noted matter is adjourned, *sine die*, on consent of the parties.

Subsequently, by letter dated May 3, 1990, counsel apologized for the late notice to the Board of the parties agreement and explained the circumstances which led to it.

5. We accept counsel's apology and explanation.

6. We do wish to point out, however, that the Board has limited resources. Naturally, the Board is concerned that these not be squandered. It appears that some counsel (we do not suggest that counsel for the applicant is one of them) and some parties have formed the view that they control the Board's processes. And it has in fact been the Board's general practice to accommodate parties which have agreed to an adjournment. When matters can be adjourned within a reasonable time prior to a scheduled hearing, the Board is often able to schedule another matter in its stead or, in circumstances where a hearing has been scheduled to be held at other than the Board's own premises (for example), to otherwise conserve its resources. Where, however, the Board does not learn of a proposed adjournment within a reasonable time prior to the scheduled date for hearing, it is often not possible to both schedule another matter for that day and give reasonable notice to the parties involved in that other matter. It is, of course, impossible to do so if the adjournment is "requested" the day before or the morning of a scheduled hearing. Last minute adjournments can also cause the Board to incur unnecessary expenses.

7. Consequently, when adjournments are not requested in a timely manner, the limited resources of the Board, which are financed by the taxpayers of this province, are squandered. That is something which must be avoided, if possible. Consequently, counsel and parties should turn their minds to whether an adjournment will be necessary at the earliest opportunity.

8. Neither counsel nor parties to proceedings before the Board should delude themselves. They do not control the practices and procedures of the Board. Subject to the provisions of the *Labour Relations Act*, the rules of natural justice, and the requirements of fairness, the Board is the master of its own practice and procedure. Parties who fail to request an adjournment, either on consent or otherwise, in a timely manner, risk not being granted an adjournment. Certainly, parties and their counsel should not assume that a request of the kind received by the Board in this proceeding (with respect to the April 17, 1990 hearing date) will be granted as a matter of course.

9. This proceeding is adjourned *sine die* for a period not to exceed one year from the date hereof. If no party requests, in writing, that the matter be scheduled for hearing within that one year period, and the matters are not otherwise disposed of by the Board, the applications will be dismissed.

0474-88-U Local 865, International Union of Operating Engineers, Complainant v. **Canadian Pacific Forest Products Limited,** Respondent

Damages - Duty to Bargain in Good Faith - Unfair Labour Practice - Employer failing during collective bargaining to disclose to the union its intention to shut down one of its turbines - Breach of bargaining duty - Union claiming damages for loss of opportunity to negotiate with respect to the impact of the shut down, higher rate of pay for remaining employees, and expenses incurred by union in enforcing its rights - Insufficient evidence before Board to substantiate any compensatory relief

BEFORE: *G. T. Surdykowski,* Vice-Chair, and Board Members *M. Rozenberg* and *H. Kobryn.*

APPEARANCES: W. Dubinsky and *R. Gallant* for the complainant; *F. J. W. Bickford, Frank Wirtz* and *E. G. Gibbons* for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER M. ROZENBERG; May 10, 1990

1. By decision dated June 13, 1989, the Board found that the respondent had breached section 15 of the *Labour Relations Act* in that it had failed to bargain in good faith when, in the course of collective bargaining between the parties, it failed to disclose to the complainant trade union its intention to shut down one of its turbines.

2. In argument, the complainant trade union had suggested that one remedial alternative available to the Board in this case was to remit the issue of remedy to the parties. In the circumstances, including the state of the evidence before the Board with respect to remedy, and our belief that labour relations matters are better resolved without litigation if possible, the Board accepted the complainant's suggestion and remitted the question of remedy to the parties. The Board did of course remain seized with the question of remedy. The Board also indicated that a Labour Relations Officer would be made available to the parties to assist them if they wished and that the Board would schedule a hearing with respect to the issue of remedy on the request of either party. Accordingly, either party could have requested a hearing at any time (see paragraphs 22 and 23 of the June 13, 1989 decision herein).

3. By letter dated September 25, 1989, the complainant asked for the assistance of a Labour Relations Officer and one was duly appointed. The parties were unable to resolve the matter between themselves even with the Officer's assistance. However, neither party requested a hearing until the complainant did so by letter dated January 31, 1990 (received by the Board on February 5, 1990). Upon receipt of that request, the Registrar scheduled a hearing.

4. At that hearing, held on April 11, 1990, the Board heard the evidence and representations of the parties with respect to the issue of the appropriate remedy in this matter.

5. At that hearing, only monetary remedies were requested by the complainant. The complainant seeks:

> (a) compensation for all losses suffered by the bargaining unit employees affected by the respondent's breach of the Act;
>
> (b) compensation to the shift engineers who have had "extra duties" since the shut down of turbine #1;

(c) compensation to the complainant for the "expenses" it itself incurred as a result of respondent's conduct;

(d) interest on all damages awarded.

The complainant's claim for damages for affected bargaining unit employees includes the wages which the complainant asserts they lost and the opportunities they are said to have lost for increased wages. The complainant described its expenses claim as one relating to damages for the loss of an opportunity to do something for the affected bargaining unit employees had it known of the respondent's intention to shut down turbine #1. The complainant stressed that it was not seeking its "legal costs" of the proceeding, but rather the expenses it incurred in attempting "to right the wrong" which had been done.

6. This is not the first time the Board has had to grapple with a difficult problem while fashioning an appropriate remedy for a breach of the duty to bargain in good faith where that breach consists of a failure to disclose pertinent information in collective bargaining (see, for example, *Devilbiss (Canada) Limited*, [1976] OLRB Rep. March 49, *Inglis Limited*, [1977] OLRB Rep. March 128, *Radio Shack (Canada) Limited*, [1979] OLRB Rep. Dec. 1220; application for judicial review dismissed in *Re Tandy Electronics Ltd. and United Steelworkers of America et. al.*, (1980) 30 O.R. (2d) 29 (Div. Ct.); leave to appeal to Court of Appeal denied at 30 O.R. (2d) 29n; *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; application for judicial review dismissed 80 CLLC ¶14,062 (Div. Ct.); *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411; [1983] OLRB Dec. 1995 (reconsideration); [1984] OLRB Rep. March 422 (remedy); application for judicial review allowed (1985) 51 O.R. (2d) 481 (Div. Ct.); appeal of Divisional Court decision allowed (1986) 56 O.R. (2d) 513 (Court of Appeal); appeal of Court of Appeal decision dismissed by the Supreme Court of Canada on March 15, 1990 [now reported at [1990] OLRB Rep. March 369]; *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453). In approaching such cases, the Board has recognized that a right which is not backed by an effective remedy has little meaning. Accordingly, the loss of opportunity to bargain for a benefit has long been recognized by the Board to be a loss which is compensable in damages. However, the Board has also recognized that its remedies must fit the circumstances of the particular case before it and must be compensatory not punitive. Such remedies must be fashioned having regard to the labour relations principles which underlie the *Labour Relations Act*. In that respect, the Board has not found it appropriate to impose or change terms in collective agreements under the guise of compensation (see, for example, *Forintek Canada Corp.*, *supra*, at paragraph 56) because the right being addressed in such cases is not the right to a particular collective agreement but rather the right to bargain in pursuit of one.

7. The purpose of a remedy in this context is to put the aggrieved party (in this case the complainant trade union and the affected bargaining unit employees) in the position it would have been in but for the wrongful conduct found by the Board. In this case, that wrongful conduct is not the actual shutting down of turbine #1 but rather the respondent's failure to advise the complainant in a timely manner of its intention to do so. The nature of the breach of the obligation to bargain in good faith which the Board has found the respondent guilty of in this case necessarily requires the Board to engage in some speculation in terms of the damages claimed by the complainant. That speculation must, however, be as informed as possible.

8. It is often difficult to assess damages in cases like this one, but a wrongdoer cannot be relieved from paying damages just because they are difficult to assess. Consequently, although an aggrieved party must prove its damages on the balance of probabilities, the nature of "loss of opportunity" cases dictates that it be given the benefit of the doubt in that respect. However, that

does not relieve an aggrieved party from the responsibility of calling sufficient evidence to establish the opportunity it lost and the damages it asserts resulted there from. It must demonstrate a reasonable probability that it could have obtained the benefit for which it seeks compensation but for the respondent's misconduct. A mere chance of a benefit will entitle an aggrieved party to only nominal damages at most. And, as the Board and the Divisional Court observed in *Radio Shack*, *supra*, damages will be reduced in proportion to the contingencies to achieving the benefit claimed in the absence of the wrongful conduct (see also *Burlington Northern Air Freight (Canada) Ltd.*, [1987] OLRB Rep. Aug. 1064).

9. In this case, the complainant trade union asserts that had it been aware of the respondent's intention to shut down turbine #1 in the steam plant and eliminate the turbine operator positions associated with that machinery, it would have negotiated additional responsibilities for that classification in order to retain the positions in it. It asserts that its negotiating committee would not have recommended acceptance of the collective agreement now in effect and that there would likely have been a strike. The complainant points out that the respondent has realized substantial savings as a result of eliminating the turbine operator positions and asks the Board to take that into account in assessing damages. The complainant provided the Board with summaries of the losses suffered by individual bargaining unit employees (but offered little else in that respect). The complainant asserts that the shift engineer in the steam plant has had to perform additional duties with respect to the turbine still operating in the steam plant (which duties had previously been performed by a turbine operator.) The complainant seeks to have the Board compensate the shift engineer(s) for this. By implication, the complainant asserts that it would have bargained an increase in wages for this shift engineer position had it had the opportunity to do so.

10. There is no doubt that the shut down of turbine #1 in the steam plant has affected both the complainant and a number of the bargaining unit employees of the respondent it represents. However, the misconduct found by the Board is not the shutting down of turbine #1 but the failure of the respondent to advise the complainant of its intention to do so. It is that failure which resulted in the complainant's loss of opportunity to negotiate with respect to the impact of the shut down. The complainant is entitled to compensation only for those damages which resulted from the wrong done, not from the shut down of turbine #1.

11. When the respondent first advised the complainant that turbine #1 would be shut down and the turbine operator positions eliminated, it indicated that it considered this to be "elimination of equipment" or "downsizing" and not technological change within the meaning of article 25 of the collective agreement between the parties. Subsequently, and although it did not specifically say that it did consider the shut down to constitute technological change, it directed that it would treat, and did treat, it as though it were technological change.

12. For what it is worth, the shut down of turbine #1 was not, in our view, technological change within the meaning of article 25 of the collective agreement or the ordinary meaning of that term. That, however, is not particularly significant. More significant, in our view, is the fact that the respondent treated it as technological change for the purpose of lessening the impact on the persons who were employed as turbine operators. In our view, this is substantially similar to what occurred in 1985 when the respondent took an evaporator in the recovery plant out of service. The evaporator shut down occurred in the context of a change from a closed to an open-ended system in which salt was no longer being recovered from the production process. The positions associated with the evaporator were eliminated and the persons occupying them were treated in accordance with the technological change provisions in the collective agreement. In our view, that was no more a real technological change than the shut down of turbine #1 was. What is significant is that

it was, with the concurrence of the complainant, treated as such for purposes of easing the impact of the elimination of the equipment on the employees whose positions had been eliminated.

13. We reject the complainant's suggestion that there is a significant distinction to be drawn between the shut down of the evaporator and the shut down of turbine #1. While it may be that none of the job functions associated with the former remained while some of the job functions carried out by a turbine operator are now carried out by the shift engineer, the fact is that in both cases the positions associated with the equipment were entirely eliminated.

14. Moreover, the evidence fails to establish that the turbine operator "skills outline" which the complainant presented to the Board reflects the "extra" functions which a shift engineer must now perform. Other evidence suggests that while the turbine shut downs, start-ups, etc. formerly performed by a turbine operator are now the responsibility of the shift engineer, these activities are not performed as often as before, and when they are done, the first helper, the first fireman, second helper or utility man assist the shift engineer. It is now also a part of the first fireman's duties to assist the shift engineer in operating the PRV and desuperheater control systems and by monitoring the alarms added to the steam distribution panel with respect to turbine #3 after turbine #1 was shut down. The Board did not have the benefit of the testimony of any shift engineer which would probably have been the best evidence of how the duties and responsibilities of that position have changed since the shut down of turbine #1.

15. Further, there is no evidence to suggest that it is more likely than not that the complainant would have been able to persuade the respondent to retain any of the four turbine operator positions had it had an opportunity to negotiate that item in the collective bargaining which led to the collective agreement presently in effect. The respondent has not given any indication of any willingness to do that. We note that the respondent had been operating four to five people short of its full time complement for the complainant's bargaining unit prior to the shut down of turbine #1. (And we observe that had the shut down occurred in the context of the full complement, layoffs, in accordance with article 6 of the collective agreement, would have been necessary.) With the elimination of the four turbine operators, and the consequent bumping down in accordance with article 6 of the collective agreement, the (reduced) complement is now, in effect, apparently full. We also note that in the recovery plant, a shift engineer looks after two turbines, not just one, without any turbine operators. Nor is there sufficient evidence before the Board to establish that it is more probable than not that the complainant could have obtained compensation for bargaining unit employees affected by the shut down of turbine #1 beyond that which has already been paid by the respondent, or at all.

16. There is no evidence to suggest that it is more likely than not that the complainant could have negotiated a higher wage rate for the shift engineers. The evidence shows that the complainant was unsuccessful in obtaining a similar wage adjustment for the shift engineer in the recovery plant when there were responsibilities added to that position as a result of an increase in that plant's size. There is nothing before the Board to suggest that the complainant would have been any more successful on behalf of the shift engineers in the steam plant.

17. In coming to our conclusions herein we have considered all of the evidence before the Board in this proceeding. In our view, the degree of the benefit realized by the respondent from the shut down of turbine #1 is irrelevant to the question of what damages were suffered by the complainant or the bargaining unit employees it represents. And, while it may well be that there would have been a strike had the information which should have been disclosed with respect to the shut down of turbine #1 been disclosed, there is insufficient evidence before the Board to establish that this would likely have induced the respondent to either retain the turbine operator positions,

or pay any employees associated there with increased compensation, either in wages or otherwise. Further, a strike would have had a negative economic impact on the employees engaging in it as well as, potentially at least, on the respondent. In contrast with the situation in *Consolidated Bathurst Packaging Ltd.*, *supra*, there is no evidence before the Board in this case of what negative impact, if any, a strike by the complainant would have had on the respondent in this case. Nor is there any evidence of how much bargaining unit support there would likely have been for a lengthy or any strike.

18. With respect to the complainant's request for compensation for expenses, we first observe that there is no indication or even suggestion that there was any anti-union motive for the respondent's decision to shut down turbine #1 and eliminate the turbine operator positions. All of the evidence, including that adduced by the complainant, suggests that the shut down and position elimination were motivated solely by economic considerations. Nor is there any evidence that there was any anti-union motive for the respondent's breach of its obligation to bargain in good faith in this case.

19. There is no evidence before the Board which even suggests that the complainant has or is likely to incur any organizing or like costs as a result of the respondent's breach of the Act. The evidence which is before the Board with respect to the expenses head of damages is wholly unsatisfactory. The complainant claims compensation for twenty-eight days on each of which it asserts it paid between two and six persons $20.00 per hour for eight hours with respect to this matter. There is no evidence of which people these were, why they or any of them were necessary participants, or that all persons for whom damages are claimed in this respect were necessarily occupied for all eight hours of each such day with the matter before the Board. On the contrary, the evidence suggests that several of the meetings for which the complainant seeks damages did not take eight hours or were not occupied solely with the matter before the Board or both. Indeed, the evidence is that a meeting on one of the days for which the complainant claims damages (March 25, 1988) was cancelled because a union representative didn't attend!

20. Further, although the complainant says it is not seeking its "legal costs", it seeks compensation for the attendance at Board hearings of four persons on six days each and for the attendance of two persons on one other day. With respect to those latter two people, it claims an entire day of travel (by air) to Toronto and an entire day of travel (by air) back to Thunder Bay. The complainant also claims damages for the return air fares, and hotel and meal expenses for those two persons (which claim is not supported by any documentation or other evidence other than a dollar amounts in the complainant's summary of expenses). Other damages are claimed for attendance at settlement meetings.

21. First, it does not take a day to travel either to or from Thunder Bay by air. Second, salaries or other payments made to union representatives with respect to attendances at Board hearings or settlement meetings with respect to matters before the Board, or with respect to meetings to prepare for proceedings before the Board are different in nature from the negotiating or other like "loss of opportunity" expenses. In *Burlington Northern Air Freight (Canada) Ltd.*, *supra* (at paragraphs 23-25) the Board reviewed its practice with respect to legal costs and like expenses as follows:

> 23. In *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, at paragraph 48, the Board, as part of a "make whole order", directed the employer to reimburse the union involved in those proceedings for "all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights", including "the costs of proceedings before the Board". In that case, the employer had closed its Call Answering Service Division in order to "rid itself, once and for all, of the union and its supporters" (see paragraphs 29 to 34). The British Columbia Labour Relations Board adopted a similar approach in *Kidd Brothers*

Produce, [1976] 2 Can. LRBR 304. However, in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (in part (d)(i) of paragraph 125), the Board declined to award legal costs in the context of proceedings involving a pervasive pattern of unfair labour practices, including violations of what are now sections 15, 64, 66, 67 and 70 of the Act. In doing so the Board wrote:

> We have decided against awarding the Complainant its legal costs in this matter. The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

Since then, the Board has been asked on a number of occasions to review and alter that policy (see, for example, *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401; *Omstead Foods Limited*, [1986] OLRB Rep. Aug. 1120; *Jean Liebman*, [1986] OLRB Rep. June 753; *Luciano D'Alessandro*, [1985] OLRB Rep. Dec. 1708; *Gerald Lecuyer*, [1985] OLRB Rep. July 1099 and [1987] OLRB Rep. April 529; *John Glykis*, [1985] OLRB Rep. March 420; and *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755. On each such occasion, the Board has declined to do so on the basis of labour relations policy considerations, including those articulated as follows in *Silknit Limited*, [1983] OLRB Rep. Nov. 1913:

> 8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a "make whole" remedy in which the aggrieved party is compensated for the costs of the proceedings, it is much less clear how one would distinguish an "ordinary" violation of the statute from a "flagrant" one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy; it is quite another to suggest that an "ordinary" breach of the Act yields one level of compensation while a "serious" one warrants a higher level of compensation. Such an approach would begin to look "penal" rather than "compensatory" (and see sections 96-99 of the Act which are expressly penal in character).

We respectfully agree with that reasoning, and having carefully considered the submissions of counsel concerning this matter, we are not persuaded that in the circumstances of the instant case we should depart from the Board's well-established practice of declining to award legal costs.

24. There is also a dispute between the Union and the Company concerning whether the Union should be compensated for the remuneration paid to Doug Grey (the President of Local 91) and Joe Bigeau (the Vice-President of Local 91 and an International Organizer assigned to that local) during the time they spent at negotiation sessions with the respondent, and at Board hearings in relation to these three complaints, the Union's application under section 40a for a direction that a first collective agreement be settled by arbitration (File No. 0819-86-FC), and the subsequent arbitration of the collective agreement (File No. 1223-86-FCA). It is the position of counsel for the complainants that those salary expenses are Union losses resulting from the

> respondent's unlawful acts and omissions. The Union also seeks compensation equal to the salary, transportation, and accommodation expenses incurred in having Richard Weatherdon, an I.T.U. International Representative, in attendance at some of the bargaining sessions. The respondent opposes all of those payments. It is the respondent's position that there was not an inordinate number of negotiating sessions, and that some negotiating progress was made at them. The respondent further contends that the salary paid to Union officials for time spent at Board hearings is one of the Union's costs of doing business, and should not be a head of damages. In this regard, counsel for the respondent also notes that the proceedings culminated in a collective agreement arbitrated by the Board pursuant to a legislative provision which was not available in previous cases.
>
> 25. We are of the view that salaries paid to Union officials while in attendance at Board hearings are analogous to legal fees incurred in respect of such proceedings, and that the reasons set forth above for denying the reimbursement of legal fees are equally applicable to such salary expenses. The same is true of salaries paid to Union officials and Union clerical staff for the time which they devoted to assembling materials for use in these proceedings and in the first contract arbitration proceedings. Negotiating costs, on the other hand, may be compensable in some circumstances (see, for example, part (d) of the order contained in paragraph 125 of *Radio Shack*, [1979] OLRB Rep. Dec. 1220). In the instant case, some of the time spent at the negotiating sessions was wasted in dealing with proposals for which the respondent had no plausible business justification and in relation to which the respondent was engaging in "surface bargaining" (see paragraph 115 of the Decision for examples of such proposals). Other time was wasted discussing relatively trivial matters which would likely have been quickly resolved if the respondent had been bargaining in good faith and making every reasonable effort to make a collective agreement. However, some time was also wasted due to the lateness, non-availability, or lack of preparedness of Union representatives (see, for example, paragraphs 56, 82, and 110 of the Decision). Moreover, many of the provisions ultimately included in the arbitrated collective agreement (in accordance with section 40a(17) of the Act) were agreed upon through bargaining which occurred at the negotiation sessions. Having regard to all of the circumstances, we have concluded that the respondent must compensate the Union for half of the reasonable negotiating expenses incurred by the Union in respect of collective bargaining with the respondent, including half of the salaries paid to Messrs. Grey, Bigeau, and Weatherdon in respect of time spent at bargaining sessions.

22. We agree. We are not persuaded that this is an appropriate case in which to award compensation for legal or like expenses. Even if we were persuaded that it is appropriate as a matter of principle, the complainant has failed to present sufficient evidence to prove any of the damages which it has labelled and claimed as "expenses".

23. In the result, the Board is not satisfied that the complainant has proved any of the damages which it claimed in this proceeding or that any remedy other than a declaration is necessary or appropriate.

24. In coming to our conclusions, we are mindful of our finding (at paragraph 18 of our June 13, 1989 decision herein), that the evidence suggests that the respondent purposely tried to keep its decision to shut down turbine #1 from the complainant until a collective agreement had been reached. There is insufficient evidence before the Board, however, for us to be satisfied that this should give rise to any compensatory or other relief beyond that which has already been given.

25. The Board therefore declares that the respondent breached section 15 of the *Labour Relations Act* and that it failed to bargain in good faith when, in the course of collective bargaining between the parties, it failed to disclose to the complainant its intention to shut down turbine #1.

DECISION OF BOARD MEMBER H. KOBRYN; May 10, 1990

1. I cannot agree with the majority because the respondent did breach section 15 of the *Labour Relations Act* and it also failed to bargain in good faith when in the course of collective bar-

gaining between the parties. The respondent did fail to disclose to the complainant its intention to shut down turbine #1. I would have awarded to the complainant compensatory relief as outlined in the complainant's exhibits as follows:

> EXHIBIT #1 - List of bargaining unit employees and the amounts owed as of June 1, 1988.
>
> EXHIBIT #2 - Wage loss by turbine operators.
>
> EXHIBIT #3 - Loss of wages by those effected by the (bumping down) of the operators.
>
> EXHIBIT #4 - Lost opportunity for increased wages by members of the bargaining unit as a result of vacation time taken by four operators.

2956-89-R Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. **Cuneo Interiors,** Respondent

Certification - Construction Industry - Intimidation and Coercion - Membership Evidence - Unfair Labour Practice - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing

BEFORE: *Inge M. Stamp,* Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague.*

APPEARANCES: *Dave Watson, Marisa Pollock* and *Mike Yorke* for the applicant; *Walter Thornton* and *D. Cuneo* for the respondent.

DECISION OF THE BOARD; May 23, 1990

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act.*

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial

> and institutional sector of the construction industry referred to in clause 117(*e*) shall be brought by either,
>
> (a) an employee bargaining agency; or
>
> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The Board further finds, pursuant to section 144(1) of the Act, that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. In its reply, the respondent alleged that the membership evidence in support of this application was obtained in violation of the *Labour Relations Act*. The respondent alleged that the applicant's violation of the Act included, but is not limited to, section 70 of the Act. The applicant's conduct described as "irregular" or "improper" by the respondent involved alleged statements made by the applicant's representative to the effect that if employees did not sign union cards they would be removed from the site. The matter was put on for hearing and the Board heard the evidence of Mike Yorke, the applicant's organizer and business representative, and John Zanette, an employee of the respondent.

6. John Zanette has been employed by the respondent as a carpenter for the last three years. The respondent installs millwork, custom furniture, kitchens, as well as free-standing items. On the application date, Cuneo was installing counter tops, work stations and credenzas for the Canadian Imperial Bank of Commerce at Lawrence Square. The general contractor C.A.S. is bound to the Carpenters' provincial ICI agreement. The contract with Cuneo violated the sub-contract provisions of C.A.S.'s agreement since Cuneo is not an employer bound by the Carpenters' ICI agreement.

7. When Yorke first arrived on the site on another union matter, he found John Zanette doing carpentry work and asked him who he was working for and whether he had a union card. Zanette told Yorke he was working for C.A.S. and that he did have a card but it was in his truck. Zanette testified that in order to get rid of the union representative, he deliberately misled him by creating the impression that he worked directly for C.A.S. and that he had a Carpenters Union card, when in fact his card was a Labourers Local 183 card. Yorke was satisfied with the information which Zanette gave him until he came across another carpenter nearby who, in response to Yorke's questions said that he and Zanette worked for Cuneo and were not members of the applicant. Yorke returned with the second carpenter and confronted Zanette. The evidence conflicts in some aspects at this point. Zanette testified that Yorke told him "if you are not with the union, you will have to get off the site" and that he (Yorke) "would see to it that we would be removed from the site". Zanette on a previous occasion had been physically removed from a union site by a

security guard. It was his evidence that he wanted to finish his day and that to avoid being removed from this site, he signed a union card.

8. Yorke's evidence is somewhat different in the way in which the events occurred on the day in question. Yorke testified that he explained to Zanette and the other carpenter about the sub-contract clause and that he might file a grievance against C.A.S. Because of C.A.S.' having a collective agreement the carpenters could not work there unless they belonged to the union. Zanette agreed in cross-examination that Yorke did mention that C.A.S. had a collective agreement with the Carpenters, but does not recall any talk concerning a sub-contract clause. Zanette agreed in cross-examination that he did not understand about sub-contracts and that it would not have mattered if Yorke had told him about it. According to Zanette, Yorke said "I will have you removed from the site", and he took that as a threat. Zanette does not recall being told about a grievance being filed against C.A.S. but agreed that it was possible. Zanette testified that he did not listen very much to what Yorke was saying other than that he would be removed from the site. At the end of his shift, Zanette told the respondent what had happened and that he signed a card because he was threatened with being removed from the site. Zanette testified that he was "forced to sign and did not have the right to make his own choice". Zanette saw the notice to employees posted on the job site and read it but took no further action. Yorke's evidence was that he explained about the sub-contract provision and that C.A.S. could have the respondent's employees removed, that C.A.S. has that right under its collective agreement and that he (Yorke) wanted the collective agreement enforced.

9. Zanette understood that unless he became a member of the Carpenters' Union and in effect, unless Cuneo became certified, he (Zanette) would no longer be able to work at that site. The enforcement of the sub-contract clause of the collective agreement between the Carpenters and C.A.S. will result in Cuneo having to either become signatory to the agreement or leave the site, unless C.A.S. is prepared to accept the consequences of a continued violation of its agreement.

10. The respondent urged the Board to favour Zanette's evidence to that of Yorke's where they differed. The respondent submits that even on Yorke's own evidence there is sufficient irregular conduct to cause the Board not to count any of the membership evidence obtained by Yorke and in the alternative, at the very least a vote should be ordered. The respondent cited a number of cases to the Board in support of its submissions.

11. The applicant submits that unless there is a section 70 violation, there is no basis for the rejection of membership evidence. The applicant cited a number of cases in support of its position that the enforcement of a union's sub-contract clause is not a violation of section 70 of the Act.

12. Both Zanette and Yorke gave substantially the same evidence with respect to the events that led up to the signing of Zanette's card. The differences in their evidence are not sufficient to require us to deal with any possible credibility issue. We are satisfied that Zanette understood the implications of a non-union contractor working on a unionized construction project. Yorke was doing his job in trying to enforce the union's rights under their collective agreement's sub-contract provisions with the general contractor. Even on Zanette's evidence, we do not find that Yorke's conduct was such that it violates section 70 of the Act or is of a nature that would cause the Board to disregard the union's membership evidence obtained by Yorke. Section 70 of the *Labour Relations Act* reads:

> **70.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a

> member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

13. Having regard to the above, the submissions of the parties and the cases cited, we find that the applicant, in the course of attempting to enforce its collective agreement with the general contractor by requiring the employees of the respondent to sign a union card or face the consequences of the enforcement of the collective agreement, did not engage in any improper conduct under the Act.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 20, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

> ..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.
>
> [emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

16. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0021-90-R; 0040-90-R Angelo Ganassin, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 785, and the Ontario Provincial Council, Respondent v. **D-K Construction Ltd.,** Intervener; Michael Parker, Applicant v. Labourers International Union of North America, Local 1081, and Ontario Provincial District Council, Respondent v. D-K Construction Ltd., Intervener

Construction Industry - Parties - Practice and Procedure - Termination - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice

BEFORE: *G. T. Surdykowski,* Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw.*

APPEARANCES: *M. G. Horan* for the applicants; *Harold F. Caley* and *Karl Ball* for United Brotherhood of Carpenters and Joiners of America, Local 785 and the Ontario Provincial Council; Craig Flood and *E. Bairos* for Labourers International Union of North America, Local 1081, and Ontario Provincial District Council; *Pamela Yudcovitch* and *Murray Dietrich* for the intervener.

DECISION OF THE BOARD; May 11, 1990

1. In each of these applications, the applicant seeks a declaration terminating bargaining rights. The applications came on for hearing together on May 10, 1990.

2. At the commencement of the hearing, the Board raised some concerns with respect to the respondents which have been named in each application, the sufficiency of the notices given of the applications, and the descriptions of the bargaining units. In that regard, the Board observed that the applications relate in part to bargaining rights in the industrial, commercial and institutional sector of the construction industry and that all of the affiliated bargaining agents whose bargaining rights might be affected by the applications had neither been named as respondents nor given notice of the applications. The Board referred the parties to its decisions in *Double S Construction*, [1988] OLRB Aug. 800; *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. July 1011; *Clarence H. Graham Construction Limited*, [1982] OLRB Aug. 1147 and *Jan Peters Ltd.*, [1980] OLRB Rep. May 714.

3. The Board then adjourned briefly to give the parties an opportunity to consider their positions. Upon returning, the Board was advised that the parties had agreed to adjourn the hearing in order to permit the applicants to name the appropriate parties and have them served with notice of the applications. The parties also agreed that this agreement was without prejudice to the rights of the respondents to argue that both applications are void *ab initio*.

4. In the circumstances, the Board found it appropriate to adjourn the hearing to a date or dates to be fixed by the Registrar.

5. In addition, the respondents in Board File No. 0040-90-R herein have filed a complaint under section 89 of the *Labour Relations Act* (Board File No. 0364-90-U) and a referral to the Board of a grievance in the construction industry (Board File No. 0365-90-G) against the intervener employer in both termination applications. The Registrar is directed to schedule all four of these matters (that is, Board File Nos. 0021-90-R, 0040-90-R, 0364-90-U, and 0365-90-G) to be heard together. How they or any of them are to proceed can be determined at the next day of

hearing. (In that regard also, we note that the applicants in Board File No. 0365-90-G have waived the time limits in section 124(2) of the Act.)

1585-88-JD International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Complainant v. **E.S. Fox Limited,** Pro Insul Limited, Sheet Metal Workers International Association, Local 562, Respondents v. Ontario Sheet Metal Workers' and Roofers' Conference, Intervener #1 v. Ontario Sheet Metal and Air Handling Group, Intervener #2 v. Master Insulators' Association of Ontario Inc., Intervener #3

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board exercising its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

BEFORE: *G. T. Surdykowski,* Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine.*

APPEARANCES: *D. A. McKee, M. A. Church, Joseph De Wit, Earl Walsh* and *Stanley W. Roos* for the complainant; *W. J. McNaughton* for the respondent E.S. Fox Limited; *L. A. Richmond* and *S. Raso* for the respondent Sheet Metal Workers International Association, Local 562 and Intervener #1; *Peter Chauvin* for Intervener #2; *Mark Contini* and *Ray Kurki* for the respondent Pro Insul Limited and Intervener #3.

DECISION OF THE BOARD; May 15, 1990

1. This is a complaint concerning the assignment of work (commonly known as a jurisdictional dispute) filed pursuant to the provisions of section 91 of the *Labour Relations Act.* When it came on for hearing on May 8, 1990, counsel for the respondent Sheet Metal Workers International Association, Local 562 ("Local 562") and the intervener Ontario Sheet Metal Workers' and Roofers' Conference (the "Sheet Metal Conference") sought an adjournment of the hearing. This request was opposed by the complainant, the respondents E.S. Fox Limited ("E.S. Fox") and Pro Insul Limited ("Pro Insul") and the intervener Master Insulators' Association ("Master Insulators").

2. Counsel for Local 562 and the Sheet Metal Conference advised the Board that representatives of his clients were unable to attend the hearing because they were involved in negotiations for a new provincial agreement in the industrial, commercial and institutional sector of the construction industry. He submitted that because his clients have a right to attend the hearings, these should be adjourned until these representatives are able to attend. Counsel conceded that he had instructions and was able to proceed with his motion that the Board cannot or, in the alternative, should not, proceed with this jurisdictional dispute in the absence of those representatives, but submitted that he could not proceed on the merits of the complaint without them.

3. It is well known that the Board will normally refuse to grant an adjournment except on consent of the parties or if it is satisfied that there are exceptional extenuating circumstances. It is the Board, and not the parties or any of them which is the master of its practice and procedure. In that regard, the Board's discretion with respect to whether or not adjournments should be granted is a broad one. A party which has had adequate notice of a hearing does not have a right to have it adjourned for its convenience or the convenience of any of its representatives (see *Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879* (1979) 24 O.R. (2d) 400 (Div. Ct.)). The Board recognized the importance of the provincial bargaining which was taking place and that representatives of parties to a proceeding before the Board have a right to be at the hearing. However, counsel for Local 562 and the Sheet Metal Conference had demonstrated no prejudice which would result in the Board proceeding with at least the argument of the motion described above, and for the purposes of which counsel would be their representative. Accordingly, the Board denied the request for an adjournment in that respect. In our view, it was premature to rule on the question of whether the hearing on the merits should be adjourned until it was necessary to determine that question.

4. The work claimed to be in dispute by the complainant is the application of aluminium cladding or lagging over insulation applied to oven circulation ducts in the paint shop of the Toyota plant in Cambridge, Ontario. The respondents E.S. Fox and Pro Insul, and the intervener Master Insulators agree with the complainants description of the work in dispute. The respondent Local 562 and the intervener Sheet Metal Conference agree that the work in dispute includes that which is described by the complainant but add that it also includes "all work related thereto, including the application of insulation material, preparatory to applying the cladding or lagging".

5. The work in question in this complaint was subcontracted by E.S. Fox to Pro Insul which assigned it to members of the complainant. On or about August 25, 1988, Local 562 filed a grievance against E.S. Fox alleging a violation of the subcontracting clause in the collective agreement between them. In September, 1988, this grievance was referred to the Board pursuant to the provisions of section 124 of the *Labour Relations Act* (Board File No. 1328-88-G). That matter was scheduled to be heard on September 12, 1988 but was adjourned to give the complainant herein, which had sought to intervene in the grievance proceeding, an opportunity to file this complaint concerning work assignment.

6. This complaint then went through the pre-hearing process established by the Board for such matters. In the course of that pre-hearing process, the Board issued a decision with respect to a preliminary motion brought by Local 562 and the Sheet Metal Conference. After the pre-hearing process was completed, Local 562 withdrew the grievance in Board File No. 1328-88-G.

7. Local 562 and the Sheet Metal Conference, supported by the Sheet Metal Group, submit that as a result of the withdrawal of the grievance, there is no longer any jurisdictional dispute before the Board and that no one is requiring that the assignment of the work in question be changed. Therefore, they submit, the Board no longer has any jurisdiction to inquire into the complaint. In the alternative, they submit that even if the Board does continue to have that jurisdiction, this is an appropriate case for the Board to exercise its discretion to not do so. They referred the Board to *Bricklayers, Masons Independent Union of Canada, Local 1*, [1978] OLRB Rep. June 495; *Anchor Shoring Limited*, [1982] OLRB Rep. Aug. 1122; *Beverly Enterprises Canada Limited*, [1985] OLRB Rep. Apr. 519; *Magna International Inc.*, [1987] OLRB Rep. Apr. 742, request for reconsideration denied June 22, 1987 (unreported) and *Commonwealth Construction Company* (OLRB decision dated January 2, 1990 unreported).

8. The complainant, strongly supported by E.S. Fox, Pro Insul and Master Insulators,

argues that the Board continues to have jurisdiction to inquire into this complaint notwithstanding the withdrawal of Local 562's grievance. It points out that the Board has jurisdiction to inquire into a complaint that a trade union etc. "*was* or is requiring..." that an assignment of work be changed. It argues that this means that the Board may inquire into a jurisdictional dispute complaint any time a demand to change an assignment of work has been made, whether or not that demand is withdrawn. Further, the complainant, again strongly supported by Pro Insul and Master Insulators, urged the Board to exercise its discretion to inquire into the complaint. The complainant submits that the real dispute between the parties continues to exist and will likely have to be litigated in the future. It argues that the Board should therefore deal with it now for future purposes. The complainant points out that the parties have been put to great expense in this proceeding and that all of the time and money which have been put in to it will be for nought if this matter does not proceed. The complainant referred the Board to *Scope Mechanical Contracting Limited*, [1984] OLRB Rep. Feb. 371 and *Steen Contractors Limited*, [1986] OLRB Rep. May 677 in support of its position.

9. Section 91(1) of the *Labour Relations Act* provides that:

> 91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

10. We find it unnecessary to determine whether the Board has jurisdiction to inquire into a complaint concerning work assignment in circumstances like those in this case. Assuming, without finding, that the Board does have the jurisdiction to continue to inquire into the merits of this complaint, this is, in our view, an appropriate case for the Board to exercise its discretion to not do so. (We do note, however, that we find much merit in the submission that the Board is without jurisdiction to do so. In that regard, we prefer the suggestion that the words "was or is requiring" in section 91(1) refer to whether or not the work in dispute has been completed to the submissions of the complainant in that respect. In our view, it would make little sense, from either a labour relations perspective or otherwise, to interpret section 91(1) in a way which would effectively prohibit a party which has made a demand that certain work be assigned in a different way from withdrawing that demand in every case: See *Anchor Shoring Limited*, *supra*,; *Commonwealth Construction Company*, *supra*; but see *Scope Mechanical Contracting Limited*, *supra* for a contrary view.)

11. *Scope Mechanical Contracting Limited*, *supra*, was a complaint concerning the assignment of work (i.e. a jurisdictional dispute). One of the respondents had filed two grievances: one against the employer which had assigned the work in question to members of another trade union, and one against the general contractor alleging that it had improperly subcontracted the work in question to the employer which had assigned the work. Both grievances were referred to the Board pursuant to section 124 of the Act. Subsequently, the grievance against the employer which had assigned the work in question was withdrawn with leave of the Board. Consideration of the second grievance was deferred pending the disposition of the jurisdictional dispute. The respondents argued that the Board had no jurisdiction to inquire into the jurisdictional dispute because the grievance against the employer which had assigned the work in question had been withdrawn and there was therefore no one requiring that the work assignment be changed. The Board referred to *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247 and was satisfied that the grievance against the general contractor could not give rise to a complaint under section 91 (see also *Harold R. Stark Co. Ltd.*, [1982] OLRB Rep. Feb. 222, April 5, 1976). The Board held that notwithstanding that

the grievance against the employer which had assigned the work had been withdrawn, the necessary demand that the work assignment be changed had been made and that the Board had jurisdiction to inquire into. However, there is no indication on the face of the Board's decision in *Scope Mechanical Contracting Limited*, *supra*, that the Board was asked to or that it considered whether it should inquire into the complaint even if it had the jurisdiction to do so. Because we have determined that it is appropriate for us to exercise our discretion to not inquire into this complaint even if we have the jurisdiction to do so, the *Scope Mechanical Contracting Limited*, *supra*, decision was of little assistance to us and we decline to comment on it further.

12. In *Steen Contractors Limited*, *supra*, the Board drew an analogy between a jurisdictional dispute proceeding and a civil proceeding in which a claim and counter-claim is made and to a mechanic's lien action in which a number of claims are made. With great respect, neither analogy is, in our view, an apt one. First, in a civil proceeding, a claim and counter-claim are considered to be separate actions within the same proceeding. In a complaint under section 91, there may be competing claims for the work in question, but there is only one action. Second, labour relations considerations are very important in jurisdictional disputes but have little or no place in civil proceedings or mechanic's lien actions. It was precisely such labour relations considerations which led the Board to deny the complainant's request for leave to withdraw its complaint in *Steen Contractors Limited*, *supra*. In paragraph 16 of that decision, the Board explained its reasons in that respect as follows:

> 16. In the instant case, therefore, while it may not make sense to compel Plumbers' Local 463 to pursue its initial claim in spite of its request to withdraw it, there are good labour relations reasons for not allowing Local 463 to bring to an end the proceedings with respect to Labourers' Local 597's counter-claim to the work. First, the work in dispute herein has been and remains a source of conflict between the two trade unions in the Oshawa area, conflict which has demonstrated a potential for causing unlawful strikes. Therefore, it makes labour relations sense that the Board proceed to determine the merits of the dispute, as Labourers' Local 597 and the intervener have argued. Second, in view of the Board's comments at paragraph 16 of its decision in the *Stark* case, *supra*, about the problems of dealing under section 124 of the Act with what is essentially a work assignment dispute, it also makes labour relations sense that the determination be made in the context of a section 91 complaint rather than leaving it to arise again as a referral of a grievance under section 124. *Given the purpose of section 91 and the fact that Plumbers' Local 463 initially came before the Board with a request for an inquiry into its claim concerning a work assignment dispute and with a request for an interim order, which it obtained, the Board is of the view that this is a case where the complainant should not be permitted to unilaterally cause the proceedings to be terminated. To allow Local 463 to do so would mean that the conflict which gave rise to the complaint would remain unresolved. The Board is not prepared to have that happen. Moreover, Local 463 has enjoyed the benefit and protection of the Board's interim order and, having set in motion a request for a final order or direction respecting the work in dispute, it should not be permitted to deprive Labourers' Local 597 and the intervener of the opportunity to have their interests in a potentially disruptive dispute protected by means of an adjudication of the matter on its merits.*
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> [emphasis added]

13. In this case, there is no indication that the work in question is a source of conflict with the demonstrated or any potential for causing unlawful strikes. Second, this is not a case in which Local 562 or the Sheet Metal Conference seek to have the proceedings terminated after having obtained the benefit of some interim relief with respect to the work assignment in question. In short, the labour relations considerations which led the Board in *Steen Contractors Limited*, *supra*, to exercise its discretion to inquire into the complaint in that case are not present in this one. Accordingly, it too was of little assistance to us.

14. The Board is an adjudicative tribunal, not an advisory body (except where the statute

specifically enables the Minister to refer to the Board any question that arises with respect to the Minister's authority to make an appointment under sections 16, 44 or 45 of the Act). Accordingly, the Board does not normally embark upon inquiries into academic or hypothetical questions (see, for example, *Magna International Inc.*, *supra*; *Beverly Enterprises Canada Limited*, *supra*; *Daynes Health Care Limited*, [1983] OLRB Rep. May 632). The Board's function is to determine labour relations matters brought before it under the *Labour Relations Act* or other legislation (like, for example, the *Occupational Health and Safety Act*, R.S.O. 1980 Chapter 321 and the *Colleges Collective Bargaining Act*, R.S.O. 1980 Chapter 74). In our view, it would be generally futile and perhaps counterproductive for the Board to engage in speculation with respect to disputes which have not developed either to the point that they have been brought before the Board or at all.

15. Perhaps the Board will have to deal with a jurisdictional dispute like this one in the future. Perhaps not. If it does, who can say what differences there will be between this dispute and one which may come before the Board in the future? Any future case may well involve work which is somewhat different, it may involve different parties, it may involve a different geographic area, and it may even involve a different sector of the construction industry.

16. In jurisdictional disputes, which are difficult enough to determine even with the benefit of evidence and representations from the parties which are affected by the dispute, it is rarely possible and generally inappropriate for the Board to attempt to determine anything more than the complaint before it. Similarly, attempts at advance rulings are generally inappropriate. The impact that the Board's jurisdictional dispute jurisprudence has on a future case is best left to be determined in that future case.

17. It is fundamental to a complaint concerning the assignment of work that there be a dispute concerning the assignment of some specific work. Where there is no demand that some specific work be assigned in the manner different from the way it was assigned, there is no continuing dispute concerning the assignment of work and no jurisdictional dispute which is appropriate for the Board to inquire into in the absence of extraordinary circumstances (as in, for example, *Steen Contractors Limited*, *supra*).

18. In this complaint, the demand that the assignment that the work described in paragraph 4 above be changed came in the form of the grievance which has since been withdrawn. Accordingly, there is no longer any trade union which is requiring that that work assignment be changed.

19. To proceed with an inquiry into a complaint where its basis has disappeared would tend to emasculate the pre-hearing procedure which has been adopted by the Board in complaints concerning work assignments. The purpose of that pre-hearing procedure is to encourage the resolution of jurisdictional disputes without a determination by the Board. Such resolutions can and sometimes do include the withdrawal of the complaint or the demand which led to it being made after the discovery afforded by the Board's pre-hearing process, and, in some cases, a determination of issues which, though they are preliminary in nature, tend to shape the litigation. Also, and perhaps more importantly, to proceed with a jurisdictional dispute in such circumstances will not usually further harmonious labour relations. Indeed, it would likely have quite the opposite effect.

20. We recognize the expense (in terms of both time and money) that the parties have incurred in this matter. The fact that Local 562 has decided to retract its demand that the work assignment in question be changed shows that this has not been for nought. In any event, the fact that expenses have been incurred is not a reason to require a matter to continue to be litigated to the bitter end and certainly does not, in our view, constitute "prejudice" within the meaning of that term in law. We also observe that if, as the complainant fears, a complaint is made to the Board with respect to the same or substantially the same work, some or all of the parties will be

able to draw upon the time and money invested in this proceeding in the course of that one. If there is no such future complaint, there is no point at all to forcing this proceeding forward.

21. In short, we are not satisfied that there is any cogent reason to proceed further with this complaint. On the other hand, the labour relations considerations favour not proceeding with it. In the result, we find it appropriate to exercise our discretion to not inquire further into this complaint. The complaint is therefore dismissed.

0711-89-R Service Employees Union Local 183, Applicant v. **Famous Players Inc.,** Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Whether single movie theatre in a theatre chain is an appropriate bargaining unit - Unit consisting of 25 high school students who work part-time - Board reviewing its policy on single branch bargaining units - Theatre is run as an independent branch - Single movie theatre found to be an appropriate bargaining unit - Certificate issuing

BEFORE: *Robert Herman,* Vice-Chair, and Board Members *M. Rozenberg* and *D. A. Patterson.*

APPEARANCES: *Norman C. Dunlop* and *Gerry Goyer* for the applicant; *Lynn H. Harnden, John Xinos* and *Pat Cioffi* for the respondent.

DECISION OF THE BOARD; May 4, 1990

1. This is an application for certification. At the time and place set for the hearing, no one appeared on behalf of the employee objectors. The Board was in receipt of a letter from the representative of the employee objectors indicating that she was unable to attend the hearing. There was no request for an adjournment. The hearing therefore continued, but it did not commence until approximately one half hour after the scheduled start time, to ensure that no one else on behalf of the employee objectors might be attending. No one appeared on behalf of any of the employee objectors at any time during the hearing.

2. As set out in an earlier decision of the Board, differently constituted, the only issue in dispute between the parties is with respect to the description of the bargaining unit. The applicant seeks to represent the employees at the theatre at Place de Ville, a theatre owned and operated by Famous Players Inc. in the City of Ottawa. The respondent asserts that a single theatre is not an appropriate unit, and the appropriate bargaining unit should consist of all theatres of the respondent in the Regional Municipality of Ottawa-Carleton, or in the alternative, all theatres of the respondent in the City of Ottawa. This appears to be the first decision of the Board which considers whether a single theatre in a theatre chain is an appropriate bargaining unit.

3. The respondent operates eight theatres within the Regional Municipality of Ottawa-Carleton, four of which are found within the City of Ottawa itself. The number of employees at each theatre ranges from thirteen to forty-six, the vast majority of whom would be part-time employees, mostly high school students. These employees work, for the most part, as ushers, cashiers, or concession attendants. The work performed by the employees at each location would be virtually identical, as are the general terms and conditions of employment. Employees work on a

predetermined schedule based upon the particular theatre's operating needs and the availability of the employee.

4. A District Manager is responsible for the overall operations of all the theatres and there is central coordination with respect to training of staff and the forms and methods of operation of each theatre. Each theatre has its own Manager, who is responsible for personnel matters involving employees at his or her theatre, including hiring, firing, discipline, scheduling, and performance evaluations. Based upon these performance evaluations from the Manager of the theatre, the District Manager decides whether an individual employee merits a wage increase. Employees are asked upon occasion to move between branches, either by substituting another theatre for the theatre they generally work at, or by working additional shifts at any theatre. A particular Manager may need extra staff, and if so he or she will call one of the other theatres and ask whether any employees of that theatre or branch are willing to do additional or substitute shifts. If an employee volunteers to do these shifts, he or she is paid for them by the theatre where the shifts are performed. There are occasions where a Manager needs help for a very short time, for a particular shift or for relatively few shifts. Again, employees are given the choice of whether to work these shifts at the other theatre. In these circumstances, where the shifts are relatively few in number, the employee would continue to be paid by the theatre at which he or she customarily works. There are no "transfers" between theatres in the sense that the employer directs employees to move to another theatre or to do additional shifts there. Insofar as employees at Place de Ville are concerned, such interaction has been infrequent and irregular. During the summer of 1988 one employee there was asked to and agreed to work additional shifts at other theatres. Employee movement in the other theatres has been greater. In all 8 theatres in the Regional Municipality, in a recent 2 year period approximately 18 employees "transferred" between theatres, in the sense of agreeing to change the theatre they usually worked at, and approximately 50 employees worked additional shifts at other theatres. Promotions to managerial positions outside the bargaining unit are made by the District Manager.

5. In arguing that the single theatre bargaining unit requested by the applicant is inappropriate, the employer notes that to grant such a unit would result in undue fragmentation and a multiplicity of bargaining units. It argues that the nature of the work and the working conditions are virtually identical at each location, and there is therefore a coherent community of interest amongst all theatres or branches. The overall administration and operation of the theatres is done on a regional basis. Although "exchanges" or "transfers" of employees at Place de Ville are limited, the employer asserts that the Board ought to take account of the entire picture of interaction, including employee activity in other theatres within the Regional Municipality.

6. The employer acknowledged that the Board does not insist on its traditional municipality bargaining units in certain circumstances and has historically found single branches in the service industry to be appropriate. Counsel noted that the reason the Board found single branch units to be appropriate was a concern that to conclude otherwise would place significant obstacles in the paths of unions attempting to organize in multi-branch contexts. Counsel argues, notwithstanding this concern, that the Board must still be satisfied that any bargaining unit found to be appropriate creates a viable bargaining structure. In the instant case, the unit requested by the applicant encompasses a relatively small number of part-time employees, most of whom are high school students. Thus, asserts the employer, the nature of the employees in the bargaining unit sought here is different from those employees in other contexts in which the Board has granted single branch bargaining units. In those bargaining units, employees were generally full-time employees. To grant a bargaining unit of approximately twenty-five high school students who only work part-time would be to create a bargaining unit with virtually no economic bargaining strength, and therefore a bargaining unit which would not in the result be viable. This lack of viability is highlighted, the

employer submits, by the fact that the turn-over of employees at Place de Ville in less than a year has been eleven out of twenty-five.

7. Recently, the Board had occasion to survey and reconsider its approach to granting single branch bargaining units. In *National Trust* [1986] OLRB Rep. Feb. 250, the application concerned branch offices of a financial institution in the Regional Municipality of Metropolitan Toronto. The parties there agreed that a single branch of the respondent would constitute an appropriate bargaining unit, but the applicant was seeking a unit consisting of seven of the thirty-seven branch offices of the respondent. The respondent asserted that, if each single branch was not to be the bargaining unit, the only other unit appropriate for collective bargaining was all of the respondent's thirty-seven branches in Metropolitan Toronto. In summarizing the jurisprudence, the Board wrote as follows:

> 12. The duty of the Board to determine the appropriate bargaining unit in an application for certification is set out in section 6(1) of the *Labour Relations Act*. That section provides:
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> > Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.
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> As the Board recently emphasized in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, however, there may in any given case be any number of bargaining-unit configurations which are not "inappropriate", and the Board, in the exercise of the discretion granted to it, must decide which of those configurations is *the* appropriate one for that particular case. After analyzing the language of some of the Board's earlier cases in this regard, and in particular the *Board of Education for the City of Toronto* case, [1970] OLRB Rep. July 430, the Board in *Hospital for Sick Children* wrote:
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> > 21. ... In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit.
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> To the same effect, see *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, at paragraph 18; *Parnell Foods Limited*, [1969] OLRB Rep. April 38, at paragraph 17. While the "most comprehensive" bargaining unit available has obvious industrial-relations advantages, the Board has long made it clear that other considerations, such as the ability to organize at all, may cause the Board to look at lesser groupings as an appropriate bargaining unit. In *Canada Trustco*, [1977] OLRB Rep. June 330, for example, the applicant trade union had organized the only branch of the employer in the town of Simcoe. The employer took the position that the only appropriate bargaining unit was either one that included the branch in the neighbouring Township of Delhi, or all of the branches in the employer's administrative division of southwestern Ontario. In reviewing its options, the Board noted:
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> > 19. In the instant case, the standardization impressed on all employment relations by the flow-charts and policies of the employer does give rise to a community of interest among all employees in the branches of the south-western Ontario region. But that does not of itself dispose of the question of what is the appropriate bargaining unit. As the Board said in *Ponderosa* (*supra* at 10):
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> > > It should be observed, however, that the Act does not create any presump-

> tion in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "'bargaining unit' means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit.
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> 20. It is also possible, of course, that different communities of interest will exist at one and the same time among several different groupings of employees. Obviously certain common employment interests exist among all employees of the respondent in Canada; the portion of those employees who are within Ontario have a further common interest; and the group of employees working under the direction of the London regional office have employments interests in common that they do not share with their fellow employees elsewhere in Ontario or in Canada at large.

13. The *Canada Trustco* case ultimately decided that the single-branch bargaining unit for Simcoe was appropriate, and, as will be discussed, that decision reflected an evolving pattern of single-branch organizing in both the financial and other sectors of he economy. Flowing from that, the respondent argues that an important measure of predictability has developed for trade unions and employees organizing in the financial sector, and that the Board ought not to jeopardize that position by moving to the unusual form of grouping being put forward by the applicant in this case. The respondent notes, in that regard, the observations of the Nova Scotia Labour Relations Board in *Michelin Tires (Canada) Limited*, [1979] 3 Can LRBR 429, at page 437:

> Another set of factors which the Nova Scotia Board regards as important, and which often dictates our determinations of appropriateness, involves the legitimate expectations of the parties to the certification process. Employees who want a union, and unions organizing them, must have a fair opportunity to know before applying for certification what the appropriate bargaining unit will be held to be. The effort and expense of an organizing campaign and of the certification procedure itself should not have to be wasted because of an unpredictable Board decision that the unit applied for is not appropriate. This Board is not bound by any formal system of precedent to follow its own previous decisions but we must attempt to make sensible determinations of appropriateness which are consistent from one case to the next.

The concern there expressed by the Board, however, was that a particular bargaining unit previously found to be appropriate would, without warning, be found by the Board after organizing *not* to be appropriate. That is not what is at issue here. And as difficult as it may be for any employer to accept, that is not the way the process has tended to work. The preamble to the *Labour Relations Act* discloses a clear legislative predilection toward the fostering of collective bargaining, and nowhere has that predilection been reflected more than in the determination of the "appropriate" bargaining unit under section 6(1). Each time the Board is persuaded to move to a further stage in bargaining-unit determinations, the history of the jurisprudence shows that the effect of that movement generally is to increase the options available to unions for organizing in the province. Exactly as applicant counsel has argued, in other words, the finding, if the Board were to make it, that a grouping of seven certifiable branches within Metro is the appropriate bargaining unit in the facts and circumstances of this case, would not in any way signal a rejection of the basis on which single-branch units have in the past been, or in the future would be, found to be appropriate (or the basis upon which they have been agreed to be appropriate in the present case).

14. To recognize that reality, however, is not to say that employees or their trade union are given a free hand to determine the form which their organizing will take. see, in particular, the *Hospital for Sick Children* case, *supra*, at paragraph 17. The goal stated in the preamble itself is to further "harmonious" relations, and, there are other interests at stake, such as those of the employer in being able to efficiently manage its enterprise. The need for "appropriateness" in a bargaining unit at all times serves as a check against tipping the scales too far in the direction of

accommodating the desire for self-organization. As the Board as early as the *Ponderosa Steak House* case, [1975] OLRB Rep. Jan. 7, put these competing considerations:

> 10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes.
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> 11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining." In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization.

15. In all cases the necessary balancing is made on the basis of the particular facts and interests in the specific case before the Board. As the Board described it in *Canada Trustco*, *supra*:

> 7. In any particular case, the determination of the unit of employees that is appropriate for collective bargaining must be grounded in the facts before the Board. The Act contemplates a process of unit determination that is not absolute and to a great extent the Board's determination must depend upon the competing alternatives presented by the parties. In the contemplation of the Act, therefore, the duty to determine the appropriate bargaining unit is a mandate to describe the unit in the light of the labour relations realities of the particular case.

The assessment of those "labour relations realities", at the same time, may be affected by historical perspectives, and form part of the continuing evolution of thought on bargaining unit "appropriateness". To draw upon the words of the Board in *Hospital for Sick Children*, *supra*, at paragraph 14:

> ... Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate.

16. That process of evolution is well demonstrated in the history of this Board (and others) coming to define bargaining units in terms of single branches or outlets. The initial approach, that of *all* retail outlets within a municipality being considered the appropriate bargaining unit, was discussed in the early case of *Goodyear Service Stores*, 65 CLLC 16,018. There the union applied for a unit of all of the employer's retail stores in Metro, and the *employer* argued that only individual stores were appropriate. The Board wrote:

> ... In our opinion, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area it would not, generally speaking, be conducive to sound collective bargaining for a series of bargaining units to be established in respect of groups of employees performing similar tasks and having similar bargaining interests. Such a situation where some employees might be represented by one trade union, others by another and others not at all would be invidious from the employer and trade union points of view as well as from the points of view of most individual employees.
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> The Board, therefore, considers that the policy it has followed in cases of retail food markets, variety chain stores and brewers' warehousing stores, and which has fre-

> quently been applied in other cases involving retail or service stores, should be adopted as its general policy in cases of retail or service stores where the interests of employees throughout a group of stores can be said to be essentially similar as in the present case.

17. That was indeed the pattern for some time, but then a Board tolerance for individual branches, or outlets, at least where the *union* was the one seeking them, began to emerge, particularly in the hospitality and financial sectors. The reason for that departure was succinctly stated by the Board again in *Canada Trustco*, [1977] OLRB Rep. June 330, at paragraph 27:

> 27. In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] 1 C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia*, (No. 2) decision of the same Board:
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> > "However, clearly one can't have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union's representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset."

18. In *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the applicant union had organized one of the four retail department stores operated by the employer in Metropolitan Toronto. The employer argued that an all-Metro unit was the appropriate one. As in *Canada Trustco*, the Board noted:

> 11. ... Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern of organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date.

The Board then went on to say:

> 18. As noted earlier the Board must balance a number of statutory objectives in the exercise of its discretion under section 6(1) of the Act to determine which is the appropriate bargaining unit in any given case. It is clear from a review of the authorities that the blanket policy enunciated in the *Goodyear* decision, *supra*, with respect to the geographic scope of bargaining units, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area, has given way to a series of considerations which must be made in each case. Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit, the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. Fur-

> thermore, in making its determination, the Board will be mindful of the precedential impact of its decision. Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization.

And, once again in that case, to facilitate organizing, a single retail outlet within the municipality was found to be the appropriate one.

19. Yet all of these departures ran contrary to the instinctive attractiveness of broader-based bargaining units, and the Board's preference for such units, where their impact would not stifle organizing, remained evident. In *Canada Trustco* itself, *supra*, the Board noted:

> 22. ... There is no presumption that the smallest unit in which a material community of interest can be found will be the appropriate bargaining unit. Along with the existence of a separate community of interest within the smaller unit, the Board must weigh the risk of fragmentation and the manageability of that unit or a pattern of units like it from the standpoint of both parties. Balancing all of these factors the Board must strive to define a rational Dilantin of employees that will be a viable entity for collective bargaining.

And in *Bestview Holdings*, [1983] OLRB Rep. Aug. 1250, at paragraph 28:

> 28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the

existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

Similar concerns have of course been reflected in the comments of other Labour Relations Boards. In the *Michelin Tire* case, *supra*, for example, the Nova Scotia Board observed:

> ... Canadian Labour Relations Boards, including the Nova Scotia Board, have recognized that from the point of view of the employer and the public, and in some respects of the employees, there are important values to be served by certifying larger rather than smaller bargaining units. Stability in industrial relations and the viability of the bargaining units certified have been dominant concerns.

This view has also received substantial elaboration by the British Columbia Labour Relations Board, notably in the *Insurance Company of British Columbia* case, [1974] 1 Can LRBR 403. That case was decided at approximately the same time as the B.C. Board in *Woodward Stores*, [1975] 1 Can LRBR 114, was granting certification for less than the full complement of retail outlets within a municipal area. In the ICBC case, the Board had before it the applications of three different trade unions, and the risks of undue fragmentation were readily apparent. In considering its overall approach to bargaining-unit determinations, the Board wrote, commencing at page 407:

> What are the standards which the Board should apply? The statute gives no specific direction for the exercise of our judgment and we must develop the guidelines on our own. That is a difficult task for several reasons, but primarily because there is a tension between the two uses of the bargaining unit. On the one hand, the scope of the unit is the key to securing trade union representation and collective bargaining rights for the employees. Since this is a fundamental purpose of the Code, the Board's definitions must be such as to facilitate organization of the employees. On the other hand, that unit sets the framework for actual bargaining for a long time into the future. A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.
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> The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.
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> A second administrative factor, this one clearly in the interest of both employer and employees, is the matter of *lateral mobility*. The presence of several bargaining units, each with their own seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee whose place of residence may have changed and who thus needs a different job or the employee who wants to improve his job position through promotion to a position which has come open in another division. It also restricts management's range of selection among qualified persons to fill a job.
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> The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on. ICBC has developed a wage structure whereby all the positions across every division have been evaluated and placed in some coherent relationship one to the other. It is unlikely that this pattern would continue if there were two units represented by different unions. Indeed, if we did not expect different terms of employment to emerge, there is no reason to allow separate representation for groups of employees.
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> Another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately.

20. In fact, the British Columbia Labour Relations Board's whole treatment of this issue is particularly noteworthy. In *Woodward Stores* itself, *supra*, the Bakers' Union had organized at three of the employer's stores in Greater Vancouver, and applied to be certified for a *separate* unit at each of the stores. The *employer* raised the problem of fragmentation with the Board, and argued that the only viable unit for it was one composed of all nine of its stores in the province, or, alternatively, of all five of its stores in Greater Vancouver. In answer to the employer's submissions, the Board wrote at page 118, as noted in our own *Canada Trustco*, *supra*:

> Whatever be the reasons for it, it remains a fact that if the Board were to focus on the long-range enquiry of how collective bargaining should best be carried on in the department store industry, it will likely achieve the short-run result that collective bargaining will not be conducted at all.

In deference to the employer's concerns, however, the Board went on to state:

> We should not leave this discussion of the Board's general policy under s. 42 of the Code without some further remarks about how we do view the problems of the development of bargaining units for an employer. Counsel for Woodwards accurately depicted the industrial instability which can be produced by a multiplicity of unions in a patchwork of small bargaining units - whipsawing of the employer, consecutive strikes and picket lines, jurisdictional disputes and so on. That is the risk attendant on a policy of facilitating the achievement of collective bargaining through the building blocks of small units. For the reasons stated above, we do not feel it desirable to forestall any such risks by sticking rigidly to bargaining units so large that the process of collective bargaining is aborted before its birth. However, we do intend to minimize that risk through a policy of strict control over the growth in the number of bargaining units in an operation such as Woodwards.
>
> There is one common practice, in particular, which produces excessive fragmentation of the employees of one employer or in one industry. A union applies to represent one small group of employees and obtains certification; a second union applies for certification for another small group and also is certified; after this process has continued for a period, another union, (perhaps one of the incumbents) applies to be certified for all of the employees except those already represented by someone else. One can understand why it is in the mutual interest of trade unions to reach that type of accommodation. However, the Board is determined not to permit that kind of practice to build in, indefinitely, a large number of small collective bargaining relationships with one employer. We will be flexible in defining appropriate bargaining units in areas such as the department store industry to afford collective bargaining some room to put down firm roots. However, after a time, rather than creating new bargaining units, we will consider that the existing units must be enlarged or merged and all of those employees represented by one "trade-union"....

And concluded, at page 122:

> While a single location bargaining unit must be considered appropriate in light of the history of bakery certifications in this province, we do consider this an apt case in which to apply our policy of minimizing the number of separate bargaining units at an employer such as Woodwards'. The Union has as members a majority of the bakery employees at each of the three store locations for which it has applied and has a substantial majority when all three are put together. Consequently we conclude that there should be one unit comprising of all the bakery employees at the *three* locations.

In addition, the Board, out of a further concern for fragmentation, went on from there to state what has come to be known as the "*Amon* principle", as follows":

> If and when the Union organizes the employees at the other locations the Board will enlarge this existing bargaining unit to include them.

21. *Amon Investments Ltd.* was a decision of the B.C. Board issued July 20, 1978. The employer owned a number of apartment buildings in Vancouver, and the union had applied for certification for the maintenance and service staff of one of them. Over the objections of the employer, the Board ruled that the employees working at that one location constituted a viable, separate bargaining unit. The Board then added, at page 20:

> This conclusion does not, as we have previously hinted, require that we ignore the concerns expressed by counsel for the Employer with regard to the potentially inconvenient and disruptive consequences of a fragmentation of the employees into a number of bargaining units. We return again to the *Woodward* decision. In granting the Bakery and Confectionery Workers International Union of America, Local 468, certification for a unit comprised of bakery employees at only three of the several stores in which the employer in that case operated a bakery, the Board added:

> " ...if and when the union organizes the employees at the other locations the Board will enlarge the existing bargaining unit to include them."

We consider the same kind of qualification to be appropriately added to the certification the Board has granted the Union for the employees at the Nelson Place Apartments. The effect of this qualification is to confine the number of bargaining units to one only.

This principle was again made reference to by the B.C. Board in another case that year, *The Original Dutch Pannekoek House*, [1979] 1 Can LRBR 212, in which the Board certified a union for a bargaining unit of two of six restaurants in the City of Vancouver.

22. By 1981, the B.C. Board appears to have been lumping together a selected number of branch outlets of an employer as a matter of course. In *Thompson Valley Savings Credit Union*, Board decision numbered 414/81 and issued September 2, 1981, the union had applied for eight of the employer's branch credit offices, and then amended it to seven. The Board wrote, in construing the language of its own statute:

> ...The Employer argues that the bargaining unit applied for by the Union is inappropriate for collective bargaining. In respect of the initial application the Employer argued that branch-by-branch certification was the only appropriate way to have Union representation of the Credit Union's employees. With respect to the amended application the Employer argued, in addition, that the unit applied for by the Union is not appropriate even if an all-employee unit were considered appropriate by the Board.
>
> This argument misconceives the requirement in the Labour code for a determination by the Board, in certifying unions, to find an appropriate bargaining unit.
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> Section 42(1) of the Labour Code reads as follows:
>
> > S. 42(1) Where a trade union applies for certification as a bargaining agent for a unit, the Board shall determine if the unit is appropriate for collective bargaining, and may, before certification, include additional employees in or exclude employees from the unit.
>
> The Board is not required to determine which is the *most* appropriate bargaining unit, but rather must determine whether the unit for which the Union applies as bargaining agent is appropriate. There is not necessarily a particular bargaining unit which the only appropriate one for an employer. The determination which the Board must make is whether the bargaining unit for which the Union applies is *an appropriate bargaining unit* (of *Royal Bank v. SORWUC*, [1978] 1 Can LRBR 326).
>
> In this case it may be arguable that individual branches of the Employer, or all branches of the Employer, are more appropriate bargaining units than the one applied for by the Union. However, that is not the determination which we must make. What must be decided is whether *the* unit applied for by the Union here is *an* appropriate bargaining unit. There is little doubt that the employees, while at different locations, share sufficient community of interest to be considered as within a single bargaining unit and I find that the unit applied for is an appropriate one for collective bargaining.

Given the comments of the Board in our own province with respect to not being required to determine the "most" appropriate unit, cited above and below, it is not apparent that the difference in the British Columbia language and our own section 6(1) is a material one.

23. Finally, the case of the B.C. Board in *Sung Food*, issued March 15, 1984, is interesting, not only because of some obvious parallels on the facts with our own, but also because it specifically addresses the question of how membership support is to be calculated. The employer operated eleven low-cost, self-service retail food outlets and a central warehouse in the Lower Mainland. The union applied for a unit consisting of four of the retail outlets. The original panel, con-

cerned about "sweep-ins", decided that membership support should be calculated *separately* for each of the four store locations. The result of that was automatic certification for a bargaining unit consisting only of the two stores for which the union had better than 55 per cent, even though the union's overall percentage amongst the four stores exceeded 55 per cent. Both sides sought reconsideration of that decision.

24. On the "four stores out of eleven" issue, the review panel wrote, at page 4:

> ...in considering an appropriate bargaining unit we must consider not only the Employer's need for a structure minimizing industrial unrest in the long run but also the Union's request for a vehicle which will allow for the establishment of collective bargaining. This four-store unit achieves one of the goals; it permits trade union representation. Does it thwart the competing one?
>
> First, the employees in these four stores presently share a common framework of employment conditions - a framework which can form the basis for a single collective agreement for all of those employees. Second, the employees in the four locations share a community of interest, receive the same training, work essentially the same hours for the same rate of pay and perform virtually identical duties. Third, although there are four different locations, the evidence reveals that there is some lateral mobility available to and utilized by the employees in each of those stores to transfer from one store to another. Finally, it is in the interests of the Employer to have a single bargaining unit where day-to-day decisions regarding the terms and conditions of employment of the employees, their continued employment, or their cessation of employment is administered through centralized management in a uniform and consistent manner.
>
> The fact that there are seven other store locations which could, in the future, be varied into this bargaining unit does not detract from the existence of a rational and defensible line being drawn around the four units presently proposed.

And then, after a discussion of *Woodward* and *Amon*, at page 5:

> ... here, an all-employee bargaining unit for all eleven stores and the central warehouse would clearly be the most appropriate bargaining unit. However, to require that would be to discourage the acquisition and exercise of collective bargaining rights which can be exercised and encompassed within the language of a single collective agreement.

The review panel then went on to decide that it had no jurisdiction to apply the 55 per cent test to any constituent *part* of an applied-for bargaining unit, and certified the union for a unit of all four stores, on the basis of its overall percentage. Whatever we might say about that latter aspect of the British Columbia Board's approach to the question, the foregoing review of the jurisprudence appears to produce one common theme in the inclinations of Labour Boards across the country when called upon to determine the "appropriateness" of a bargaining unit: except to the extent that it would unduly create an obstacle to the introduction of collective bargaining at all, for a variety of labour-relations considerations affecting all parties to an application for certification, as well as the public, generally "bigger is better".

25. Before turning to the facts of our on case, it is important to refer once again to the present state of the jurisprudence on bargaining-unit "appropriateness" in the province of Ontario. That state is best set out in the Board's recent decision, adverted to earlier, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. To begin with, that case notes the following passage from *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481:

> 50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered.

And further, at paragraph 20:

> 20. In *Kidd Creek* (and *Stratford General Hospital*, to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation of industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted.

And finally, at paragraph 23:

> ... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.
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> [emphasis added]

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35. The final point that the Board must consider is the respondent's submission that the Board ought not to use its power to determine bargaining units as a means of addressing the question of relative strength at the bargaining table. The respondent submits that that is a matter appropriate for the parties themselves to address in bargaining, and the respondent points in support to the decision of the Canada Labour Relations Board in *Bank of Montreal*, [1982] 2 Can LRBR 390.

• • •

38. We fully recognize that the designation of "the appropriate bargaining unit" by the Board may carry with it a significant impact on, amongst other things, the question of strength at the bargaining table. As the Board noted in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, at paragraph 50:

> ... section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord.

And, ironically, as was also noted in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, at paragraph 5:

> ... The company maintains that the Board must look to bargaining structures which will work and argues that the proven viability of all-store units should convince the Board to follow its standard practice with respect to retail outlets. The company points to the certification within the banking industry on a branch by branch basis as an example of a bargaining structure which has not worked.

8. Returning to the facts, the Place de Ville theatre is run essentially as an independent branch. The Manager makes all decisions with respect to hiring, firing, and scheduling of employees. Although employees from Place de Ville do work at other theatres, and employees throughout

the 8 theatres do work shifts at different theatres, the "transfers" or additional simultaneous shifts are agreed to by employees and are usually shifts in addition to their regular shifts at their base theatres. Although fragmentation and a potential multiplicity of bargaining units could result if a single theatre is found to be appropriate, as the jurisprudence recited indicates, those legitimate and significant concerns must be weighed against the obstacles to organizing that would be created by finding a multi-branch bargaining unit to be the only appropriate bargaining unit.

9. It may well be that the employer's prediction will prove to be accurate and the bargaining unit sought by the applicant will not provide it with sufficient bargaining strength to secure any significant gains for the employees. But this potential bargaining strength problem does not warrant the conclusion that bargaining would not be viable in what is otherwise an appropriate unit, a unit where employees share a sufficiently coherent community of interest.

10. In the result, we are satisfied that the bargaining unit sought by the applicant is an appropriate bargaining unit, and having regard to the agreement of the parties, the Board finds that all employees of the respondent regularly employed for not more than twenty-four (24) hours per week at the Place de Ville cinemas, 300 Spark Street, Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff and projectionist constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 27, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

1608-89-G International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, Applicant v. **Foundation Company of Canada Limited,** Respondent v. Labourers' International Union of North America, Local 506, Intervener #1 v. Duron Ontario Ltd., Intervener #2

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers - Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as "agent" for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute

BEFORE: *Ken Petryshen,* Vice-Chair, and Board Members *G. O. Shamanski* and *C. A. Ballentine.*

DECISION OF THE BOARD; May 9, 1990

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.

2. In a decision dated January 9, 1990 the Board determined that the circumstances giving rise to the grievance did constitute a jurisdictional dispute under section 91 of the Act. Our reasons for so finding are as follows.

3. The respondent ("Foundation") is a general contractor in connection with the construction of Terminal III, Lester B. Pearson International Airport ("the project"). Foundation is bound by both the applicant's ("Ironworkers") (Rodmen) provincial agreement and Intervener #1's ("Labourers") provincial agreement. Foundation sublet to Intervener #2 ("Duron") certain work in connection with the placing of concrete toppings at the parking garage at the project and, in particular, the placing of wire mesh associated with such concrete toppings ("the work in dispute"). Duron is bound by the Labourers' provincial agreement but not by the Ironworkers' (Rodmen) provincial agreement. Duron assigned the work in dispute to members of the Labourers and applied the Labourers' provincial agreement to this work. The subcontract agreement between Foundation and Duron requires Duron to utilize only workmen on the site who are members of the appropriate Toronto Construction Association affiliated unions for the work being performed.

4. B. Nilsen is Foundation's area manager on the project. Representatives of the Ironworkers met with Nilsen on September 21, 1989 and with Nilsen and A. Jordan, project manager, on September 29, 1989. T. Almeida was the principal spokesperson for the Ironworkers. The Board finds it unnecessary to detail what was discussed on these two occasions. In essence, the Ironworkers took the position with Foundation that the work in dispute fell within the jurisdiction of its trade union and should be performed by its members. The Ironworkers asked Foundation to take back the work in dispute from Duron and to subcontract the work to a subcontractor in contractual relations with the Ironworkers. The Ironworkers referred to Foundation the names of some contractors who could perform the work in dispute. Given what Almeida said to Nilsen on September 21, 1989, Nilsen assumed that the Ironworkers would attempt to shut down the project if Foundation did not comply with its request.

5. On September 21, 1989, after meeting with the Ironworker representatives, Nilsen sent a transmission by fax to Duron, the material portion of which reads as follows:

> Local 721 - Iron Workers have indicated that placing of the rebar and wire mesh, in the topping, is their work. Please confirm that you are using Local 721 members to place rebar & mesh.
>
> Work stoppage has been threatened if we do not conform.

Duron responded to the above transmission in a way which indicated that Duron and the Labourers were strongly of the view that the work in dispute fell within the Labourers' jurisdiction.

6. On September 26, 1989, the Ironworkers filed the following grievance against Foundation:

> Be advised that we hold you in violation of our collective agreement, in particular Article 2. The nature of the grievance is that the company has sublet the wire mesh at Terminal Three Parking Garage Airport to a company which is not in contractural [sic] relationship with the International Association of Bridge Structural and Ornamental Ironworkers or any of its affiliated local unions. By way of settlement the union seeks payment of wages, benefits and other remittances that should have been paid to our members and to the union. If no settlement is made within 24 hours of receipt of this telegram application will be made under section 124 of the ontario labour relations act requesting damages for violation of the agreement plus legal fees. ...

After obtaining legal advice, A. Jordan sent a letter dated September 27, 1989 to Duron which stated the following:

> In connection with the Terminal III project, Lester B. Pearson International Airport, we have received a grievance from The International Association of Bridge Structural and Ornamental Iron Workers, Local 721 dated September 26, 1989. (Hereinafter referred to as the "Ironworkers Grievance".) Please find enclosed a copy of the Iron workers' grievance, dated September 26, 1989. The Iron Workers' grievance concerns the placing of concrete toppings which is now being performed at the Parking Garage at Terminal III by Duron Ontario Ltd. (Hereinafter referred to as the "work") or more specifically the placing of wire mesh associated with these concrete toppings.
>
> We wish to remind you that, in accordance with your contract agreement, you must provided [sic] the correct union affiliated workmen to perform the above-noted work.
>
> Pursuant to the Iron Workers' grievance, we are hereby required to direct you to employ members of The International Association of Bridge Structural and Ornamental Ironworkers, Local 721 to perform the above-noted work at the Terminal III project immediately.

When it sent the above letter to Duron, Foundation did not expect that Duron would comply with its request in the circumstances and, therefore, it was not surprised when Duron did not comply with its request.

7. At the meeting on September 29, 1989, Foundation proposed to the Ironworkers that the work in dispute continue to be performed by Duron with Labourers for the remainder of 1989 and that the parties would attempt in some way to resolve the issue. The Ironworkers agreed to the proposal. On October 4, 1989, members of the Ironworkers working for certain contractors on the project established a picket line at the project at the start of the work day which lasted for approximately two hours. It is clear that the members of the Ironworkers were picketing in response to the Labourers performing the work in dispute. The project was basically shut down for the day as a result of the picketing activity. A few days later, Foundation deferred the performance of the work in dispute until the 1990 season.

8. Section 91(1) of the Act provides as follows:

> **91.**-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

9. As the wording of the above provision indicates, a jurisdictional dispute within the meaning of section 91 of the Act will exist where an agent of a trade union was or is requiring an employer to assign particular work to persons in a particular trade union rather than to persons in another trade union. The parties agreed that Duron is the employer since it is the entity assigning the work in dispute. Since the Ironworkers did not make a direct approach to Duron, the focus of the parties' submissions was on whether Foundation was the agent of the Ironworkers when it directed Duron to employ members of the Ironworkers to perform the work in dispute.

10. Foundation, Duron and the Labourers take the position that the filing of the grievance by the Ironworkers and the direction to Duron by Foundation to employ Ironworkers to perform the work in dispute are circumstances sufficient to constitute a jurisdictional dispute within the

meaning of section 91 of the Act. In essence, it is argued that these circumstances indicate that the Ironworkers want its members to perform the work in dispute and that Foundation, after receiving the Ironworkers grievance, acted as the Ironworkers' agent when it directed Duron to employ Ironworkers to perform the work in dispute. In support of their position, these parties relied on *Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, Structural & Ornamental Iron Workers, Local 736*, [1969] 1 O.R. 405; *Beer Precast Concrete Limited*, [1969] OLRB Rep. Jan. 1108; *Donaldson-Barron Limited*, [1976] OLRB Rep. Dec. 793; *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247; *Pre-Con Company, A Division of St. Mary's Cement Limited*, [1981] OLRB Rep. July 947; *Harold R. Stark Company Limited*, [1982] OLRB Rep. Feb. 222; *Four Seasons Drywall Systems and Acoustics Limited*, [1989] OLRB Rep. June 599.

11. Counsel for the Ironworkers argued that the facts do not support the conclusion that Foundation was acting as the Ironworkers' agent when it sent the letter of September 27, 1989 to Duron. Counsel noted that the Ironworker representatives did not ask Foundation to assist them in obtaining the work in dispute for their members from Duron. Rather, it was emphasized that the Ironworkers' complaint to Foundation was that it had improperly subcontracted out the work in dispute and that this work should be taken back from Duron and subcontracted to an Ironworker subcontractor. Counsel also noted that no one, especially Foundation, would have expected that Duron would assign the disputed work to the Ironworkers when requested to do so by Foundation. The Ironworkers relied on certain passages from *Bowstead on Agency* and *Bruton v. Regina City Policemen's Ass'n, Local No. 155*, [1945] 3 D.L.R. 437 (Sask. C.A.), *Abe Dick Masonry Limited*, [1976] OLRB Rep. Jan. 74 and *Day Signs Limited*, [1976] OLRB Rep. May 217.

12. Having regard to the purpose of the Act and, in particular, the purpose of section 91 of the Act, the Board has given the word "agent" in section 91(1) of the Act a broad interpretation. The Board has taken the same approach in its interpretation of the word "agent" as Fraser, J. in *Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, Structural & Ornamental Iron Workers, Local 736*, *supra*, when he made the following comments:

> In my opinion the word "agent" as used in s. 66(1) is used in its ordinary colloquial sense. The Oxford English Dictionary (1988 edition) gives as one of the meanings of agent:
>
> > 4. Of persons: One who does the actual work of anything, as distinguished from the instigator or employer; hence, one who acts for another, a deputy steward, factor, substitute, representative or emissary. (In this sense the word has numerous specific applications in commerce, politics, law, etc., flowing directly from the general meaning.)
>
> Having regard to its context and the purpose of the statute in which it is found I am satisfied that "agent" in s. 66 is used in its broad general sense rather than in a narrow specialized sense such as is found in the law of contracts. To hold that a union could avoid the effect of s. 66 by interposing some third person or agency to do the requiring would give s. 66 an unduly restrictive meaning and frustrate the plain purpose of the enactment.

13. In determining on the facts before us that Foundation was acting as agent for the Ironworkers, the Board has adopted the general approach of the *Pre-Con Company* decision. In our view, the general position of the Ironworkers was that it wanted its members to perform the work in dispute. Although its representations to Foundation indicated that it wanted to obtain the work in dispute in a particular way, the Ironworkers' ultimate goal was to obtain the work in dispute. In response to receiving the Ironworkers' grievance, Foundation directed Duron to employ Ironworkers to perform the work in dispute. In effect then, Foundation's response to the grievance was to make a direction to Duron consistent with the ultimate object of the Ironworkers. In determining in a broad general sense whether Foundation was acting as an agent for the Ironworkers in the circumstances of this case, the Board's focus must be on what the Ironworkers ultimately wanted and

not the process by which it wanted to attain its objective. Although Foundation did not expect anything to change, nonetheless it did, on behalf of the Ironworkers, request Duron to alter the assignment of the work in dispute. In what is very much a typical dispute over work jurisdiction, the Board was satisfied in these circumstances that Foundation was acting as the Ironworkers' agent when it directed Duron to employ ironworkers to perform the work in dispute and that the circumstances giving rise to the grievance before us constituted a jurisdictional dispute within the meaning of section 91 of the Act.

1455-88-G Labourers' International Union of North America, Local 506, Applicant v. **Four Seasons Drywall,** Respondent

Construction Industry - Construction Industry Grievance - Sector Determination - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed

BEFORE: *Louisa M. Davie,* Vice-Chair, and Board Members *J. Lear* and *H. Kobryn.*

APPEARANCES: *Elizabeth Mitchell, Nick Barbieri* and *Larry D'Andrea* for the applicant; *Robin B. Cumine* and *Vern Zapfe* for the respondent; *Donald McNeill* for subpoenaed witness, *Jim Holmes.*

DECISION OF THE BOARD; May 30, 1990

1. This is a referral of a grievance to the Board made pursuant to section 124 of the *Labour Relations Act* ("the Act"). The applicant, Labourers' International Union of North America, Local 506 ("the Labourers" or "Local 506") has grieved that the respondent, Four Seasons Drywall ("Four Seasons") has violated the subcontracting provisions of the collective agreement between the Employer Bargaining Agency and the Labourers International Union of North America, and the Labourers International Union of North America, Ontario Provincial District Council ("the ICI agreement") to which these parties are bound.

2. Four Seasons had a contract for the supply and installation of drywall and other acoustic construction material for a highrise senior citizens home in Scarborough, Ontario ("the project"). The grievance alleges that the following work performed at the project was subcontracted by Four Seasons in violation of the ICI agreement:

(1) The off-loading of drywall at the point of delivery on the construction site;

(2) conveying the drywall to local stockpiles, if any, on the floors of the building, or to the point of installation; and

> (3) stockpiling the drywall at the local stockpiles, if any, or at the point of installation if there was no local stockpile.

The movement of drywall from stockpiles to point of application, or the movement of drywall from stockpile to stockpile is not an issue in these proceedings.

3. Although the Labourers originally claimed damages for the alleged breach of the ICI agreement, at the hearing counsel indicated that damages were no longer being sought. The remedy requested was limited to a declaration that the work was construction work which, under the circumstances, was covered by the ICI agreement. The Labourers also seek a declaration that the performance of this work by persons who are not members of the Labourers union is a violation of the security provisions of the ICI agreement including the subcontracting provisions. Finally, the Labourers requested that the Board direct Four Seasons to comply with the provisions of the ICI agreement and direct Four Seasons to ensure that Labourers perform this work.

4. The respondent raised a number of defences to the grievance including *inter alia* that the work in dispute was not construction work or alternatively work covered by the ICI agreement, and in any event the work complained of was not work which was subcontracted by Four Seasons.

5. At the commencement of the hearing counsel for Four Seasons also raised as an issue that the project did not fall within the industrial, commercial and institutional sector ("ICI") of the construction industry. It was asserted that because the ICI agreement did not apply to this project and the grievance alleges *only* a violation of that agreement this grievance must be dismissed. The parties agreed that because that issue was clearly severable from the other outstanding issues raised in this grievance and could potentially be dispositive of the entire matter the Board should deal with that issue first. We agreed to do so.

6. On January 10, 1990, after having heard the evidence and submissions of the parties as to whether this project fell within the ICI sector of the construction industry we orally ruled as follows:

> The issue to be determined is where, on the continuum between the residential sector on the one hand and the ICI sector on the other hand this project falls. As counsel stated, viewed objectively or standing back from this building would one look at it and say this is residential or not. Having carefully considered the evidence and submissions of the parties we have concluded that this project falls within the type of project which the Board found to be in the ICI sector of the construction industry in *Sword Contracting Limited*, [1985] OLRB Rep. May 743. On the basis of the evidence before us we also find that this is a project which falls within the ICI sector.

Counsel for Four Seasons requested written reasons for our decision which we now provide.

7. The work which led to this dispute was performed at a project which involved the construction of a building in Scarborough, Ontario. The building constructed is called Seven Oaks and is a Home for the Aged, constructed and operated pursuant to the *Homes for the Aged and Rest Homes Act*. It is one of seven Homes for the Aged operated on a non-profit basis by the Municipality of Metropolitan Toronto, Metropolitan Community Services Department. Application for residence in the building is administered by a central Intake Department of the Metro Homes for the Aged. A day care program for senior citizens is also operated from this facility. There is no statutory requirement that Homes for the Aged be "licensed".

8. The facility consists of private and semi-private rooms for residents. It has two hundred and fifty beds. Fifty percent are in private rooms and fifty percent are in semi-private rooms. The rooms contain individual washroom facilities but do not contain any cooking facilities. The building has an open reception area, lounge area, gift store, meeting rooms, a common dining area and common recreational facilities.

9. The building consists of at least five floors. On each floor there is an area where someone is or can be stationed behind the desk with a telephone. Although there are medical and nursing services available on a twenty-four hour basis the parties disagreed as to whether this area was a "nursing station" as that term is commonly understood in a hospital setting. The area does have oxygen equipment. The rooms of the residents are or can be connected to the telephone located in this area through a central switchboard.

10. The criteria for admission to the facility is that residents must be sixty years of age or over. Persons with Alzheimer's disease may qualify for admission if they are under sixty years of age. Residents in the building pay a fee to live in the facility. That fee is dependent on the type of care required by the resident as well as their type of accommodation (private or semi-private).

11. There are two levels of care provided in the facility -"residential care" and "extended care". The type of care provided was described as "daily living assistance". That term includes assistance in dressing, bathing, personal functions, feeding, etc. It does not include medical or diagnostic care although qualified staff may administer prescription drugs. "Residential care" was described as providing less than one and a half hours of care per day. "Extended care" on the other hand provides between one and a half hours and three hours of care per day. We note that Regulation 502 to the *Homes for the Aged and Rest Homes Act* defines "extended care services" and "residential care" in section 1(1)(d) and section 1(1)(l) in the following manner:

> (d) "extended care services" means care and maintenance given to a resident that includes skilled nursing and personal care given by or under the supervision of a registered nurse or where the Director approves, a registered nursing assistant, under the direction of the physician of the home appointed under subsection 12(4) of the Act, for a minimum of one and one-half hours per day;
>
> (l) "residential care" means care and maintenance that is not extended care services given to a resident in a home;

12. The facility provides emergency or vacation services for persons who require temporary (seven to twenty-eight days) accommodation as a result of an emergency or because another primary care-giver is on holidays. The facility designates at most two beds for this purpose. Of the two hundred and forty-nine occupied beds at the time of the hearing, thirty beds were occupied by persons who were classified as "purely residential". The remainder of the beds were for extended care or for residential care residents. Unlike the "purely residential" group these residents all have some physical or psychological infirmity. The extent of that infirmity and the consequent care required varies. Within the extended care group there is a subgroup of thirty-two beds for persons who suffer from Alzheimer's disease. That group occupies one wing on the first floor of the facility. Security measures which prevent residents from leaving this area differentiate this group from other residents of the facility.

13. A note provided by the Metropolitan Community Services Department, Homes for the Aged Division outlines the accommodation offered in the following manner:

ACCOMMODATION:
249 BED CAPACITY MADE UP OF PRIVATE AND SEMI-PRIVATE ROOMS WITH ENSUITE WASHROOMS.

1st Floor: Special Care Unit

2nd Floor: Physical Care/Cognitively Impaired Unit

3rd Floor: Physical Care/Alert Unit
4th Floor: Psycho Social Unit
5th Floor: Independent Unit & Armenian Unit

Using this framework the "purely residential" residents inhabit the fifth floor while those with Alzheimer's are on the first floor. The Home does have some relationship with what was described as the "nursing home system" although the nature of that relationship was not precisely defined before us. Apparently, as the need for care increases residents may move from Seven Oaks to a licensed nursing home.

14. The facility is not affiliated with any particular hospital. It does have staff, including medical staff, to provide care to the residents. At the time of the hearing the staff consisted of fifteen registered nurses, eight registered nursing assistants and fifty-four health care personnel. In addition, a medical doctor attends at the home one or two days in the week for scheduled periods of time. The nursing professionals employed wear a uniform.

15. In *Sword Contracting Limited*, [1985] OLRB Rep. May 743 the Board held:

> . . .
>
> However, while the fact people reside in a facility is one factor that suggests that the construction of the facility comes within the residential sector, it is not by itself necessarily determinative. People reside in a number of facilities that do not come within the generally understood meaning of the term residence. For example, servicemen may reside in army barracks and convicted criminals reside in correctional facilities, and yet it is questionable whether the construction of either of these types of facilities involves work coming within the residential sector of the construction industry.
>
> 37. In assessing what type of construction does come within the residential sector, the logical place to start is with the construction of a single family home to be owned by the family that will be residing in it. Such construction clearly comes within the residential sector. When one moves away from this clear-cut example, however, the matter becomes more complex. For example, it might be argued that the construction of a rental apartment building should be viewed as commercial construction because the owner intends to operate the facility to make a profit. On the other hand, however, once an apartment unit is rented out it becomes someone's home in the generally accepted use of that term. The residents carry out their activities of daily living in a physical area they have a tenancy interest in, and immediate control over. There has grown up a clear and generally accepted practice in the Toronto area of treating the construction of apartment buildings as coming within the residential and not the ICI sector of the construction industry. Based on this practice, the Board has in the Toronto area recognized such construction as coming within the residential sector. Indeed in the *West York* case, on the basis of a generally accepted local practice, the Board concluded that a building built by an institution but comprised primarily of self-contained apartment units also came within the residential sector. The Baker Centre is, however, even further removed from the example of the single family home. Although accommodation will be provided at the Centre, it will not be in self-contained units. Rather, individuals will be required to conduct a major part of their activities of daily living, including eating and bathing, in shared areas not under their direct control. No matter how concerned staff might be about giving residents as much autonomy as possible, it seems reasonable to assume that residents will have to conform to certain rules and norms relating to matters such as meal times. In the nursing home portion of the Centre, residents will be receiving daily nursing care under the direction of a professional nursing staff. Staff working in both the retirement

> and nursing home portions of the Centre will not be under the immediate direction of the residents, as would be the case of domestics employed in a home, but rather under the direction of a company hired for the express purpose of managing the Centre.
>
> 38. In the health care field the word institution has developed a negative connotation, primarily because it connotes a medical model of care where an individual loses more autonomy over his daily living activities than is necessary. However, outside the health care field, the word institution has a much more neutral connotation. The term is generally used to refer to an organization established to provide a service viewed as being of benefit to either the public at large, or to some specific group. For example, schools, universities and churches are generally viewed as institutions. In this sense of the word, we also view the Baker Centre as an institution. It is a non-profit organization formed in part for the socially beneficial purpose of providing facilities for the elderly who are unable or unwilling to live independently. Through an outside management firm and a fairly large staff of employees, the Centre will be providing nursing care and other forms of assistance to its elderly residents. The Centre will also house day care facilities for children and elderly persons. The Baker Centre is held out to the public as being associated through the Northwestern Health Centre with the Northwestern General Hospital. The bylaws of the Baker Centre require that a majority of the directors of the Centre, including the chairman, either be connected with the Northwestern General Hospital or be approved by the board of directors of the Hospital. Given all of these factors, we are satisfied that the construction of the Baker Centre does come within the industrial, commercial and institutional sector of the construction industry as that term is used in the *Labour Relations Act*.

16. Similarly, on a spectrum which starts with the construction of the single family home (which is clearly within the residential sector) on one end, and ends with the construction of a public institution which provides medical care such as a hospital (which is clearly in the ICI sector) on the other, we are of the view that Seven Oaks falls within the latter part of this spectrum.

17. The rooms of the residents are not self-contained apartment units. Individuals who reside in the facility must share a number of common areas including the dining room and presumably conform to rules relating to those common areas such as scheduled hours of use, scheduled hours for meal times, etc. Unlike the kitchen or family areas in a private residence, persons who reside in Seven Oaks cannot simply make use of the eating and recreation areas at Seven Oaks whenever and however they please. As was the case in *Sword Contracting*, *supra*, residents at Seven Oaks will be required to conduct a significant part of their daily living in "shared areas not under their direct control".

18. With the possible exception of residents on the fifth floor, residents at Seven Oaks receive daily care from professional nursing staff and other health care providers employed at Seven Oaks. The staff complement cannot be said to be equivalent to domestic personnel employed in a private home. Similarly as in *Sword Construction*, *supra*, Seven Oaks is a non-profit facility which serves the community by providing accommodation to elderly persons who, at a minimum, require assistance with the functions of daily living. In that sense, it is an "institution" which provides a service to the community.

19. Finally, neither the fact that residents consider this to be their "home" (unlike the case of a barracks or jail) nor the fact that residents are not transient and may reside there for a long period of time in the same manner as residents of an apartment or a single dwelling, persuade us that the scales are tipped in favour of finding this to be a residential project. On balance, having regard to the entirety of the evidence we find that the project falls within the ICI sector of the construction industry.

20. We now turn to the merits to the grievance.

21. Four Seasons purchased the drywall material from a supplier called Builders Supply

Company ("Builders"). The terms of purchase provided that the material be delivered to the local stockpiles on each floor of the building. Title to the drywall did not pass from Builders to Four Seasons until the drywall was delivered to the local stockpiles. Risk of damage to the drywall during transportation or delivery was therefore born by Builders. Builders either had to replace damaged sheets of drywall or reimburse Four Seasons for repairing the damaged sheets of drywall.

22. Drywall can be delivered to designated places on a construction project either through use of a crane (generally for deliveries fifty feet up or more), a boom truck (generally for deliveries to the first three floors of a project), or manually (where drywall is unloaded and placed on the ground, or into a service elevator, or an outside hoist and then taken to the designated floor).

23. In this case Builders used a boom truck to raise the load of drywall to the fifth floor level of the project. On the fifth floor the load of drywall was received by employees of Builders who then stockpiled the drywall. The price of the drywall included the placement of the drywall on the different floors of the project as directed by Four Seasons.

24. The work which forms the basis of this grievance was performed on the project by the employees of Builders and not by the employees of Four Seasons. Builders does not have a contractual relationship with the applicant or with any of the affiliated local unions bound to the ICI agreement. Local 506 does have a collective agreement with a number of other building supply companies ("unionized suppliers") from whom the respondent does or can purchase drywall material.

25. Four Seasons has always purchased its drywall in this manner i.e. price includes delivery to the floors by the supplier. In the past it has used both unionized suppliers and supply companies which do not have a contractual relationship with the Labourers. In determining from whom to purchase material, Four Seasons considers availability of material, whether the supplier is already delivering drywall or other materials to the site for other contractors, and the service, dependability and flexibility of the supply company. Whether the supply company is unionized or not is not a factor in its decision. Neither is that a factor in the ultimate price paid for the supplies.

26. Typically, access to the building being constructed or the availability of elevators on a construction project for the purpose of delivering drywall to designated floors is limited. Delivery of drywall therefore often occurs at odd hours of the day or night when access to the building is more easily attained. Use of the employees of the building supply company eliminates certain scheduling problems which would result if Four Seasons had to coordinate the delivery of drywall with the availability of its own employees or Labourers "borrowed" from the general contractor on-site to unload the drywall.

27. The Labourers claim that the work performed by the employees of Builders is work in the construction industry. Relying upon *Cedarhust Paving Company Limited*, [1964] OLRB Rep. Dec. 442 at 445 the applicant argued that the work was construction work because it was an "integral and necessary part of the business" of Four Seasons in constructing the interior walls of the project. It was asserted that in the drywall contracting business the unloading of drywall was an "essential feature" of the business so that persons engaged therein were engaged in construction activities.

28. Counsel for the Labourers argued that the present circumstances were distinguishable from that line of cases where the Board has held that "delivery" of materials to a construction site does not constitute construction activity because of the "functions" of the work involved. Unlike the delivery cases where material was simply "dropped" on-site, here the employees of Builders were involved in more than a simple delivery. It was argued that in the present circumstances the

employees of Builders were actively engaged on-site for several hours in the unloading, handling and conveying of materials. Counsel asserted that there was a significant difference between a truck driver who simply dumped a load of sand, gravel or asphalt on-site, and the present circumstances where employees were engaged on-site for lengthy periods of time to off-load a truck. She stated that the receipt and distribution of the material on the site is integral to the construction activity of applying the drywall. Counsel for Local 506 submitted that it has been long established in the construction industry that the unloading, handling, conveying and distribution of materials on a job site is construction activity and, subject to the jurisdictional claims of other trade unions to "handle" their own materials, is generally recognized to be Labourers work. Counsel also urged us to adopt the "first drop" principle accepted in other jurisdictions to find that although "delivery" of materials to a site is not construction activity, the unloading and handling of such materials in the circumstances of the present case does constitute construction work. (See for example, *Dillingham Corporation of Canada Ltd.*, [1981] Can. L.R.B. Rep. 25 and the cases referred to therein).

29. Moreover, counsel for the Labourers argued that the work was covered by the ICI agreement in Schedule "E" and in Article 17.03 of the Local Union Schedule for Local 506 (which relates to the work jurisdiction of employees engaged in plastering and drywall). Those articles provide:

> **SCHEDULE "E"**
>
> **Subject to Article 2.06 - Work Claimed But Not Limited To**
>
> *Tenders tending* masons, plasterers and *carpenters. Tending shall consist of preparation of materials and the handling and conveying of materials.* Demolition work, debris handlers, dumpmen, watchmen, guards flagmen, material checkers, store keepers, tool crib attendants and yardmen, sewers, watermains, drains and the building and installation of manholes and catch basins.
>
> ARTICLE 17 - PLASTERERS' AND DRYWALL LABOURERS
>
> 17.01 The following additional provisions shall apply to Employees engaged in Plastering and Drywall:
>
> **17.03 Work Jurisdiction**
>
> The Jurisdiction of the Union in regard to this type of work shall be as follows:
>
> *The tending and assisting of* plasterers, lathers, sprayers, and *drywall applicators*, the operation and maintenance of mixers, pumps or any other similar mechanical device used in the performance of the Employer's operations, *including the handling and distribution of all materials whatsoever into job area stockpiles or any other specific work areas designated by the Employer* whether or not the same are to be re-used again, the cleaning and removal of all debris associated with the above operations. All of the work involved in the erection of tubular metal or any other type of scaffolding
>
> [emphasis added]

30. In the present circumstances, the Labourers claim the work from the unhooking of materials from the boom (or crane if a crane is used) on the fifth floor through to its distribution around the floor. In circumstances where the drywall is unloaded manually, the Labourers' claim extends throughout the manual process. We note that the Labourers' witnesses each acknowledged that "tending" was different and distinct from the unloading of materials. The Labourers do not

assert that the unloading of materials delivered to a site is the "tending" of carpenters or drywall applicators.

31. The Labourers further claim that the work has been subcontracted by Four Seasons to Builders insofar as Four Seasons has subcontracted the handling of construction material to Builders. The Labourers argue that the subcontracting is in violation of Article 2.05 of the ICI agreement. That article states:

> 2.05 The Employer agrees to engage only sub-contractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract, except as provided in Schedule "D" thereof.

It is asserted that Four Seasons has control of the work, chooses the drywall supplier and directs when, where and generally the manner of delivery and stockpiling of materials and that this work was improperly subcontracted to Builders in violation of Article 2.05. In so doing, counsel relied *inter alia* upon *Dalton Engineering & Construction Ltd.*, [1988] OLRB Rep. June 567 and *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. March 279. Counsel asserted that the unloading, handling and distribution of drywall material on-site was severable from the purchase of that material. Although Four Seasons can continue to purchase material from non-unionized suppliers, it must arrange for a different method of delivering and handling or conveying that material on-site. It is asserted that part has been improperly subcontracted in this instance.

32. The Labourers assert that in circumstances such as these a drywall contractor can use its own labourers to receive and stockpile the drywall on the various floors of the project when it is boomed up by the driver of the supplier's truck. Alternatively, the drywall contractor can use the general contractors' labourers to perform that work and reimburse the general contractor for the use of such labourers. Finally, it was argued that a drywall contractor such as Four Seasons can purchase drywall from a unionized supplier whereupon the employees of such unionized supplier could perform the work. It was asserted that each of these options would be in compliance with the subcontracting provisions of the ICI agreement.

33. In response to these submissions and in defence of the grievance, counsel for Four Seasons argued that the delivery of materials to be used in construction is not itself a construction activity. The "delivery" of materials in this instance includes the unloading of those materials from the delivery truck to the stockpiles on the floor either by crane, boom or manually. Counsel relied upon *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962 at paragraph 9, *Canadian Road Asphalts Limited*, [1980] OLRB Rep. March 299 at paragraph 17 and *Maitland Redi Mix-Concrete Products Limited*, [1980] OLRB Rep. Dec. 1751 at paragraph 6. Counsel argued that the concept of a "first drop" was not applicable in Ontario or in the circumstances of this case.

34. Counsel for Four Seasons also submitted that the applicant itself has recognized that the work is not construction work because it has negotiated a collective agreement outside the ICI collective agreement in respect of this work. He argued that the collective agreement which the applicant has with the unionized suppliers covers the work which, in this case, was performed by the employees of Builders. The evidence discloses that Local 506 negotiates the same "standard" collective agreement with each of the unionized suppliers (the "suppliers agreement"). Counsel pointed to section 146(2) of the Act and argued that, as an affiliated bargaining agent and member of the designated employee bargaining agency, Local 506 can only be bound to or conclude one collective agreement affecting the employees it represents in the ICI sector of the construction industry. That collective agreement is the "provincial agreement" as defined in section 137(1)(a). In light of the statutory provisions, Local 506 cannot, in the ICI sector, have two different collective agreements covering the same work. Therefore, if the suppliers agreement covers the work

performed by the employees of Builders, that work must be excluded from the ICI collective agreement. The alternative is to find that those portions of the unionized suppliers collective agreement are null and void. Counsel submitted that this latter alternative should not be accepted and that the Board should presume Local 506 intended to act within the law (especially section 146(2) of the Act) when it negotiated the jurisdiction clause in the suppliers agreement.

35. In support of this submission, counsel referred to the evidence of the applicant's own witnesses. Those witnesses testified that the work performed by the employees of Builders is described in Clause 23 of the suppliers agreement. Moreover these witnesses agreed that if Four Seasons had purchased the drywall material from one of the unionized suppliers the "delivery" of that material by the employees of the unionized supplier would have been performed pursuant to the terms of that agreement.

36. The relevant provisions of the suppliers agreement are Articles 3 and 23.

> ARTICLE 3: RECOGNITION
>
> 3:01 The Employer recognizes the Union as the sole and exclusive Bargaining Agent for all of its employees working in and out of the Employers yards in O.L.R.B. Board Area #8, *engaged in the handling and delivery of Building Materials to Construction Sites*, save and except non-working foreman, office and Sales Staff.
>
> ARTICLE 23: APPLICATION OF PLANT/WAREHOUSE
>
> EMPLOYEES IN THE FIELD
>
> 23.01 The jurisdiction of employees covered by [sic] this Agreement shall be restricted to the following:-
>
> (a) All work in connection with the handling and placing of stockpiles of drywall and other materials, as may be introduced into the industry.
>
> (b) It is agreed, whenever the above materials are hoisted directly from truck or conveyance into the building, this material will be received and distributed into area stockpile or stockpiles in the approximate area of installation by members of the Labourers' International Union of North America, Local 506 covered under this Agreement.
>
> (c) When materials are placed in a *common location* inside the building all of the work involved in the handling and placing of materials into area stockpile or in the approximately areas of installation shall be done by the members of the Labourers' International Union of North America, Local 506 covered by this Agreement.
>
> DEFINITION OF COMMON LOCATION SHALL BE:
>
> The area immediately adjacent to the opening of a building wall, or entrance of elevator, or any give floor of building.
>
> DEFINITION OF STOCKPILES SHALL BE:
>
> Areas other than the common location above, i.e. partitions, rooms and areas of installation.

The rates of pay and other terms and conditions of employment of the employees covered by the ICI agreement are significantly different from the rates of pay and terms and conditions of employees covered by this suppliers agreement.

37. The respondent also asserted that its method of arranging for the delivery of drywall

materials to a construction project have been well established and well known for a significant number of years. The same practice by which Four Seasons obtains the building materials and supplies on-site has also been the general practice of other drywall contractors in the industry for many years. Counsel argued that the fact that this well known and well established practice of delivering drywall materials has not been challenged by either the Labourers or any other trade union (and in particular Carpenters Local 675) is indicative of the fact that the work is recognized as being outside the construction industry and outside the provisions of the ICI Collective Agreement.

38. Finally, counsel for Four Seasons submitted that the work which was performed by the employees of Builders was not subcontracted by Four Seasons to Builders. He asserts that the contract between Four Seasons and Builders was for the supply of materials to the floors of the project. Counsel argues that it is impossible, and in any event impracticable to sever from that supply contract that portion which relates to delivery or unloading of the drywall on the floors of the project. In this regard counsel points to the uncontradicted evidence led by the respondent that throughout the course of the respondent's own business undertakings (and generally within the drywall contracting industry) the price for the supply of drywall includes delivery to the floors of a project. Counsel also argued that the ownership of the drywall does not pass from the vendor supply company to the purchasing contractor until the drywall is delivered to the floor of the project. Therefore, it cannot be said that Four Seasons subcontracted work over which it had control.

39. Notwithstanding counsel's submissions to the contrary, we find that we do not have to decide in any general or all encompassing terms whether "delivery" of materials is or is not construction work. Neither do we have to determine where the "delivery" of materials stops and the "handling and conveying of materials" or the "handling and distribution of all materials whatsoever into job area stock piles" begins. We do not read the cases referred to by counsel as standing categorically for the proposition that delivery of materials to a construction site is not construction work. Indeed in our view the cases indicate that whether or not "delivery" of materials is construction work is a question which can only be answered having regard to the particular facts and circumstances of the case. In our view it is neither necessary nor desirable that the Board precisely define what is "delivery" and what is "handling" or "conveying" or "distribution". An all encompassing definition of any of these terms is neither possible nor practical. Each case must turn on its own facts.

40. In the circumstances of this case we find that the delivery of drywall to the fifth floor of the building and the work performed by the employees of Builders in this regard is not construction work and is not work covered by the ICI agreement. On the basis of the facts and evidence before us and after consideration of the submissions of the parties we find that the work performed by the employees of Builders is work specifically covered and referred to in Article 23 of the suppliers agreement.

41. We agree with the respondent's submissions that Local 506 cannot have two different collective agreements covering the same construction work in the ICI sector. The evidence of the Labourers' witnesses, and their position throughout the hearing indicates that if Four Seasons had purchased from a unionized supplier, the "delivery" of the drywall to the fifth floor could have been performed by the employees of the supplier pursuant to the terms of the suppliers agreement. The reasonable inference to be drawn from that evidence and that position is that the work is not construction work and is not covered by the ICI agreement because construction work in the ICI sector *must*, by reason of statute, be covered by the ICI agreement. In the circumstances, we therefore conclude that the delivery and unloading of drywall by employees of a building supply company (and specifically the work performed by employees of Builders in this instance) is not

construction work and does not, and was not intended to fall within the "handling", "conveying" and "distribution" of materials as referred to in Schedule E and Article 17.03 of the local union schedule for Local 506 of the ICI agreement.

42. As the delivery of the drywall to the local stockpiles on the fifth floor is not work covered by the ICI agreement it is unnecessary to determine whether the contract between Four Seasons and Builders in respect of that work is a subcontract. Assuming without deciding that the work was in fact subcontracted by Four Seasons to Builders, such subcontract would not be a violation of the ICI collective agreement because it is not with respect to work covered by the ICI agreement.

43. The grievance is dismissed.

2695-88-R; 2927-88-U; 2997-88-U United Steelworkers of America, Applicant v. **GSW Inc.** c.o.b. as GSW Heating Products Division, Respondent v. Group of Employees, Objectors; United Steelworkers of America, Complainant v. G.S.W. Inc., c.o.b. as G.S.W. Building Products Company, Respondent; GSW Inc., c.o.b. as GSW Heating Products Division, Complainant v. United Steelworkers of America, Respondent

Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Petition - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

BEFORE: *Owen V. Gray,* Vice-Chair, and Board Members *G. O. Shamanski* and *C. McDonald.*

APPEARANCES: *P. Turtle* and *W. Dowsett* for the United Steelworkers of America; *Steven J. Fishman* for GSW Inc. c.o.b. as GSW Heating Products Division; *Darrell Dexter* for the objectors.

DECISION OF VICE-CHAIR OWEN V. GRAY, AND BOARD MEMBER C. MCDONALD; May 7, 1990

1. In our decision of July 18, 1989 in these proceedings we made the following findings:

> We are satisfied on the basis of all the evidence before us that as of the date determined in paragraph 2 more than fifty-five per cent of those employed in the bargaining unit at the time the application was made were members of the applicant.
>
> We are not persuaded that at the time this application was made the employer had plans for expansion which were sufficiently certain as to war-

rant our directing that a representation vote be conducted at a future date to determine the outcome of this application.

We are not persuaded that the employees who acted as organizers for the union engaged in conduct which should result in our exercising our discretion to direct that a representation vote be conducted.

We find and declare that the respondent violated the *Labour Relations Act* by questioning employees with respect to whether they had joined the applicant or attended union meetings.

We certified the applicant without directing a representation vote, awarded certain remedies for the employer's violation of the Act and dismissed a complaint by the employer that the union had violated the Act. We indicated in our decision that our reasons for it would be provided at a later date, if requested. Both parties have requested that we do so.

The "Build-Up" Issue

2. When the Board grants certification without a vote under section 7, the representation question is determined by the wishes of those employed in the subject bargaining unit on the application date. When the Board directs that a representation vote be conducted, the outcome is determined by the wishes of those employed in the unit on a later date or dates determined by the Board. Over the years, the Board has said it will exercise its discretion under subsection 7(2) of the Act in favour of directing a representation vote so as to enfranchise subsequently hired employees when it is persuaded that, as of the application date, the employer had a firm plan for an imminent "build-up" of the work force in the bargaining unit to such an extent that those employed in the unit on the application date are not truly representative of those expected to be employed in that unit in the long term. In that event, the Board will also defer both the conduct of the vote and the date as of which voter eligibility is determined until a representative number are so employed.

3. Before it will direct a deferred vote by reason of planned "build-up", the Board must be persuaded that the plan is "firm", in that its actualization is not dependent on factors beyond the control of the employer, and that the planned build-up will take place within a reasonable period of time. It must also be persuaded that the existing group is insufficiently representative of the expected total. That normally turns on whether the employees employed at the time of the application constitute less than fifty per cent of the level employment will reach as a result of the build-up. In assessing "build-up" situations, the Board generally does not take into account normal fluctuations in the respondent's work force arising out of the cyclical or seasonal nature of the particular business in which it is engaged: (see generally *F. Lepper & Ltd.*, [1977] OLRB Rep. Dec. 846; *United Parcel Service Canada Ltd.*, [1978] OLRB Rep. Feb. 172; *Gabriel of Canada Limited*, [1981] OLRB Rep. July 876; and, *Marley Roof Tiles Limited*, [1984] OLRB Rep. Mar. 511.) For a build up to warrant a deferred vote, then, the number of employees who will be added to the unit during the "build-up" must normally exceed the number employed on the date the application is made.

4. The respondent sought application of these "build-up" principles to its particular circumstances. Those circumstances were the subject of testimony by Samuel McCullough, Vice-President and General Manager of the respondent's Heating Products Division. He spoke of the respondent's having decided in mid to late 1987 to increase the volume and range of its heating products line, so as to become the number two manufacturer of such products by 1990. Mr. McCullough spoke in general terms of the steps taken to transform this goal into detailed business plans which affected both the subject plant and other plants operated by the respondent. With

respect to the detailed business plan affecting the subject plant, Mr. McCullough spoke of the situation as it existed when he testified on May 18, 1989.

5. Mr. McCullough identified the products in respect of which increased production was anticipated and gave the respondent's estimate of the number of additional persons required in each case as a result of the required increase in production. He said eleven further employees were needed to deal with increases in production needed to meet fresh customer commitments that had been obtained in pursuance of the company's business plan. Three additional employees were needed because of additional demand which a program of marketing in the United States was expected to create. Six additional employees were needed for the expansion of "B Vent" product and nine for production of chimney liner components. He added this total of twenty-nine additional employees to the 1988 peak level of employment of fifty-eight persons to get a total of eighty-seven persons expected to be employed at the subject plant within six to nine months after the date of his testimony, 9 1/2 to 12 1/2 months after the application date. Less half that number - 41 persons - were employed in the bargaining unit on the application date.

6. We do not propose to record here in detail the plans about which Mr. McCullough testified. One feature of that testimony was that a significant portion of the increased production would be performed on a new, state-of-the-art machine which the respondent had committed to purchase for approximately three hundred thousand dollars. The machine is described in an engineering study addressed to the respondent and dated January 1988. Mr. McCullough testified that the commitment to purchase the machine had been made in the week prior to his testifying before the Board, some months after the application date.

7. Although the respondent bore the onus of establishing that it had a firm plan for build-up *as of the application date*, Mr. McCullough did not address the precise status of the respondent's planning as of that date. While Mr. McCullough's evidence supports the conclusion that a plan of the sort he described had been under active consideration at that time, there was insufficient evidence to persuade us that there had been a firm commitment to such a plan at the time the application was filed. That alone was a sufficient basis for the decision we made in this regard.

8. There was another reason not to treat this as a "build-up" which should result in our directing a representation vote: the contemplated "build-up" was not of the magnitude which ordinarily leads the Board to order and defer a vote. On Mr. McCullough's own evidence, the build-up was to create twenty-nine further jobs. He acknowledged that there was a seasonal fluctuation in sales of the products produced at the plant. While variations in rate of production were less radical than fluctuations in sales, as a result of production for inventory during slow months and sale for inventory during busy months, he acknowledged that there was a seasonal fluctuation in employment levels at the plant from a minimum in the winter months to a maximum in the late summer and early fall months. No specific explanation was given for the difference between the number employed in the bargaining unit on the application date and the 1988 peak employment figure Mr. McCullough used in calculating anticipated total employment following the "build-up". The most reasonable inference which may be drawn is that the difference reflects a seasonal fluctuation which Mr. McCullough expected to repeat in 1989.

9. As we have already noted, seasonal fluctuations are ordinarily ignored in assessing a claim that a planned build-up warrants directing a deferred vote. Build-up principles ordinarily apply only when the number of new jobs resulting from the build-up is expected to exceed the number of existing jobs. That is not so here, where the number of new jobs is 29 and the number of existing jobs is 41. The planned build-up was not of sufficient magnitude to warrant a deferred vote, even if the plan for it had been firm as at the application date.

Allegations of misconduct by union organizers

10. On January 26, 1989, seven employees of GSW at its Nobel plant met with Wes Dowsett, a full time representative of the union. They wanted the union to organize the Nobel plant. Mr. Dowsett explained what would be involved. He said he had other commitments which would prevent him from being actively involved in organizing the plant at that time. He instructed them on the procedure they could follow to organize the plant themselves by obtaining the membership evidence necessary to support an application for certification. Between January 26 and January 30, 1989, members of this employee organizing committee obtained written applications for membership from thirty-seven individuals. Thirty-six of those were employed in the bargaining unit on January 31, 1989 when this application for certification was filed. Those applications and one other membership application obtained on January 31, 1989 constitute the membership evidence on which the union relied in its application for certification. As we noted earlier, forty-one individuals were employed in the bargaining unit on the date of application.

11. Calven Hefferton was one of the seven employees on the organizing committee. The respondent alleges that when Mr. Hefferton approached fellow employee Glenn Doherty on February 12, 1989 to solicit a membership application, he told Mr. Doherty that another employee, Tim Dixon, had already joined. The respondent says that Tim Dixon is a senior employee who is particularly well regarded by the work force and that the representation that he had joined the union was false when made, to the knowledge of Mr. Hefferton. Mr. Doherty testified that the approach and representation were made. He also testified that he had the opportunity to and did question Tim Dixon about whether he supported the union before making any decision about signing an application for membership himself. Mr. Hefferton admits approaching Mr. Doherty, but denies telling him that Tim Dixon had signed a card.

12. The respondent says Mr. Hefferton tried to get fellow employee Fred Dehnicke to join the applicant by offering to give him a free pass to the Canada's Wonderland Amusement Park if he would do so. All of the witnesses who spoke to this issue agree on these facts: one Friday at the end of the shift, as workers were lined up at the punch clock to punch out, Mr.Hefferton offered Mr. Dehnicke a free pass to Canada's Wonderland if he would join the union, but Mr. Dehnicke declined to join. Mr. Hefferton says the offer was a joke, that he did not seriously expect that Mr. Dehnicke would join the union. Several of the union's witnesses say that the other assembled employees responded with laughter when Mr. Hefferton made the "offer". Furthermore, it was the evidence of Mr. Hefferton and the other union witnesses that the Friday on which this incident occurred was the Friday following the terminal date, when no new membership evidence would have had any affect on the certification application. Mr. Dehnicke could not recall whether the Friday in question fell before or after the terminal date. Darrell Dexter claims Mr. Dehnicke told him of the incident on February 13th, the Monday prior to the terminal date. Mr. Dehnicke made no mention of a contemporaneous conversation with Mr. Dexter about this incident. He did say that he reported the incident to Frank Kennedy, a foreman in the employ of GSW, on the day it occurred. Mr. Kennedy was not called to testify as to the date on which the incident was reported to him. There was no suggestion that Mr. Kennedy was unavailable.

13. The respondent alleges that when Mr. Hefferton met with Dennis Dumonte on January 31, 1989, he told Mr. Dumonte that the sole purpose of signing a card was to get a vote. Mr. Dumonte testified to that effect and said that another member of the organizing committee, Sam Lacosse, told him not to worry about having signed a card, that he could express his true feelings in an election. Mr. Hefferton's discussion with Mr. Dumonte occurred at the end of January, when it would have seemed clear to him that the union already had more than enough support for outright certification. Mr. Hefferton denies telling Mr. Dumonte that the sole purpose of his signing a card

would be to get a vote. Mr. Lacosse does not believe he told Mr. Dumonte that he could express his feelings in an election.

14. Greg Stephens was another of the members of the organizing committee. The respondent alleges that Mr. Stephens threatened Glen Doherty's job during the organizing campaign. Mr. Doherty says Mr. Stephens told him that if the union got in he personally and his job would be "threatened and straightened out." Mr. Doherty also testified about an incident in early March 1989, when Mr. Stephens told him to keep his mouth shut or be slapped on the side of the head. Mr. Doherty's job involves setting up machines, including a machine or machines operated by Mr. Stephens. This has resulted in conflict between Mr. Stephens and Mr. Doherty, conflict which began well before the organizing campaign did. It is apparent that Mr. Stephens did make some comment to Mr. Doherty to the effect that once the union got in, his (Stephens') concerns about how Mr. Doherty's work affected him could be dealt with. It is also apparent, as the respondent alleges, that Mr. Stephens raised his voice to Mr. Doherty during a discussion about why Mr. Doherty would oppose the trade union when he was planning to quit within the next couple of days, as Mr. Doherty concedes everyone thought at the time. When he told Mr. Doherty that his job would be straightened out when the union came in, Mr. Stephens did not say that this "straightening out" could be avoided if Mr. Doherty joined the union, nor does Mr. Doherty claim to have taken the threat in that way. The threat itself was not likely to induce in Mr. Doherty a desire to join or otherwise support the union. The respondent alleged that Bruce Hines similarly "threatened" Mr. Doherty's job. Not even Mr. Doherty's evidence supported that allegation.

15. It is clear that on Friday, March 10, 1989, Mr. Stephens told Mr. Doherty to keep his mouth shut or he would slap him in the side of the head. It is also clear that this happened after Mr. Doherty saw Mr. Stephens riding on the back of a forklift, and that the threat was intended by Stephens and understood by Doherty to relate to the possibility of Doherty's reporting this violation of safety rules to management. The threat had nothing to do with the participation of either of them in these proceedings.

16. The respondent alleges that other employees' jobs were threatened by the organizing committee. Tim Dixon testified that he overheard Greg Stephens tell another employee, Phil Newell, that the union would make things rough on employees who did not sign cards. Both Mr. Stephens and Mr. Newell deny having any such conversation. Mr. Dixon testified that another of the employee organizers, Rick Eldridge, told him that the union was attempting to oust Darryl Dexter from his job. Mr. Eldridge's version of this conversation is that he told Mr. Dixon of having heard that if the union got in, Darryl would not have his maintenance job. Mr. Eldridge testified that he had heard employees say Mr. Dexter was not qualified for his maintenance job. It seems to have been thought that the arrival of the union on the scene would bring an end to the use of unqualified people in skilled jobs.

17. Like the tension between Mr. Stephens and Mr. Doherty, employee debate and concern about Mr. Dexter's lack of formal trade qualifications began well before the union's organizing campaign. There is no suggestion that the organizers told anyone that the additional jeopardy to Mr. Dexter's job associated with the union's coming in could be avoided if Mr. Dexter joined the union, nor does Mr. Dixon claim to have understood the remarks that way. Again, the job "threat", if it was one, was not tied to support for or opposition to the trade union.

18. Notice of the certification application was posted in the workplace on February 9, 1989. On February 10, 1989, Darryl Dexter began collecting signatures on a document ("the petition") expressing opposition to certification of the applicant. Before lunch that day, Bruce Hines came into Mr. Dexter's office and asked to see the petition. Mr. Dexter said he could not see it unless he

was willing to sign it. Mr. Hines retorted that Mr. Dexter could not refuse to let an employee see the petition. Mr. Dexter responded that he knew Mr. Hines was pro-union and said he had a right to keep the petition confidential. Mr. Hines did not get to see the petition. His parting remark was to the effect that Mr. Dexter had better know what he was doing, that he was going to need a lawyer because "we are going to take you to court".

19. Mr. Dexter says that after Mr. Hines left, he telephoned the Board and was put through to one of the Registrar's assistants. He says she verified to him that he did not have to show Mr. Hines the petition.

20. Mr. Dexter says Mr. Hefferton came into his (Mr. Dexter's) office about 10 minutes after Mr. Hines' visit and asserted a right to see the petition. Mr. Dexter said he had spoken to the Registrar about that and did not have to show the petition. According to Mr. Dexter, Mr. Hefferton then told Mr. Dexter that he had better know what he was doing and that he would need a lawyer. Mr. Dexter again telephoned the Board and spoke to one of the Registrar's assistants about whether he would need a lawyer and whether he could lose his job as a result of taking time off work to present his petition at the Board's hearings in the certification application. He says he was assured that he did not need a lawyer.

21. Sam Lacosse was the next member of the employee organizing committee to visit Mr. Dexter in his office that day. He persuaded Mr. Dexter to show him the petition by suggesting he might sign it. He examined the signatures on it, then left Mr. Dexter's office without signing it. Mr. Dexter says that within a short time thereafter petition signers told him they were being threatened by union supporters with court and court costs and told that anyone whose name was on the petition would be summonsed to court.

22. Tim Dixon and Bruce Hines both testified that Mr. Hines approached Mr. Dixon and asked him why he had signed the petition, in view of remarks he had made about the employer on an earlier occasion. Mr. Dixon says Mr. Hines used an angry, aggressive tone during this discussion. He does not say he was threatened with court and court costs.

23. Dennis Dumonte signed the petition on Friday, February 10th. Mr. Hines learned of this after Mr. Lacosse got to see the petition. Mr. Hines caught Mr. Dumonte's eye and gestured to him, rubbing his thumb against his index and middle fingers in a motion suggestive of money. When Mr. Dumonte asked what the gesture meant, Mr. Hines told him he would have to go to "court" about the petition, which would cost him money because he would have to take time off work. Mr. Dumonte got worried about going to "court". When he discussed this with Mr. Lacosse, Mr. Lacosse said the only way around going to "court" was to sign a counter-petition. On February 13th, the next working day, Mr. Hefferton told Mr. Dumonte unconditionally that he would not be summonsed by the union as a witness. Mr. Dumonte thereafter signed a counter-petition which the union filed by mail on the terminal date.

24. Mr. Dexter says Mr. Hefferton approached him a second time on February 10th with respect to the petition. Mr. Hefferton accused him of making an untrue statement to another employee, Rhonda Ray, about the number of petition signatures he needed in order to get a vote. According to Mr. Dexter, Mr. Hefferton told him that what he was doing was illegal, that he would need a lawyer and that all this would cost him money. Mr. Hefferton admits commenting about the legality of what he felt was Mr. Dexter's misrepresentation to Rhonda Ray, but denies telling Mr. Dexter that he needed a lawyer.

25. On Mr. Hines' evidence, his visit to Mr. Dexter would have taken place after Mr. Hef-

ferton's first visit. He acknowledges saying "I'll see you in court" and that Mr. Dexter had better have a lawyer. He says Mr. Dexter replied "She says I don't need one".

26. Mr. Dexter collected six signatures on his petition on February 10th. He testified that he decided not to solicit more signatures after learning that those who had signed it were being harassed by union supporters. His evidence, however, is that he brought the document with him to work the following Monday. While Mr. Dexter had it at the workplace that day another employee signed it then, a few minutes later, returned to cross his name out because he had changed his mind. Mr. Dexter also went into town that Monday and got another employee's signature on the petition. We concluded from his evidence that he mailed the petition to the Board that day because he mistakenly thought that was the deadline for mailing such documents to the Board.

27. The employer argued that misconduct by members of the employee organizing committee made the union's membership evidence unreliable as a basis for certification without a vote. It also argued that their interference with the circulation of a petition should lead the Board to exercise its discretion under subsection 7(2) of the Act in favour of conducting a representation vote.

28. We begin our assessment of these claims by observing that thirty-six of the thirty-seven cards on which the union relies were signed in a four day period which began on January 26 and ended on January 30, 1989. There is no direct evidence of any impropriety in connection with the collection or solicitation of any of those cards. The respondent relies entirely on events alleged to have occurred subsequent to that period. Even if the members of the employee organizing committee did all of the things they are accused of, that would be no reason to doubt that the thirty-six cards obtained prior to January 31st reflected the true wishes of the signatories at the time they signed them unless we were also to infer, from the evidence we have heard, that similar improprieties must have occurred on a significant scale prior to that date. In assessing this possibility, we are asked to take into account evidence the employer led in support of the proposition that the applicant trade union had a reputation for violence in the Parry Sound community.

29. The evidence on this latter point was that various of the witnesses had in times past heard, through rumours or media reports, of incidents of violence which occurred during strikes at plants represented by the applicant. In our view, none of the stories related by the witnesses would necessarily have led a reasonable person to suppose that the applicant was responsible for or condoned any of those incidents, nor could it necessarily have engendered a belief that the applicant or its representatives would resort to violence in order to get its way in an organizing campaign. Indeed, none of the witnesses suggested that they believed the applicant union would resort to violence in order to obtain membership evidence. What some of them did say was that members of the employee organizing committee were loud and aggressive by nature and seemed to the witnesses to have a potential for violence. The evidence does not persuade us, however, that any employee might have signed an application for membership out of fear that his or her personal safety or job security would be in jeopardy from the union or its supporters if he or she did not sign. We do not accept the testimony of Mr. Dixon that he overheard Mr. Stephens tell Mr. Newell that the union would make things rough on employees who did not sign cards. With the exception of that alleged conversation, there is no allegation that any employee was threatened with physical or economic reprisal if he or she did not join the union. The most probable explanation for the speed with which the union collected cards from nearly ninety per cent of the employees in the bargaining unit is that there was a strong appetite for union representation and collective bargaining among those employees at the time they were approached.

30. Messrs. Doherty, Dumonte, Dehnicke, Dixon and Dexter were among those whom the employee organizers thought least likely to support union representation. The organizers had been

instructed by Wes Dowsett to stay away from those likely to oppose the union, so as to avoid a confrontation. None of them was approached until the union had applications for membership from nearly all of the other employees. We are not persuaded that whatever took place in dealings between those five employees and the members of the organizing committee would have been characteristic of the dealings which had taken place earlier with other employees.

31. In *Carleton University*, [1975] OLRB Rep. April 308, the Board found that a letter which had been widely circulated by the applicant trade union among the employees from whom it was soliciting cards might have led those employees to believe that there would be a representation vote in any event before the applicant was certified. In those circumstances, the Board exercised its discretion under subsection 7(2) to conduct a representation vote even though the applicant had submitted evidence that more than fifty-five per cent of those employed in the bargaining unit had applied for membership by the relevant date. There is no evidence that before January 31, 1989 anyone was told that there would be a representation vote in any event. Bearing in mind that the organizing committee had collected cards from over eighty per cent of those in the bargaining unit before Mr. Hefferton had his conversation with Mr. Dumonte on January 31, 1989, we do not believe Mr. Hefferton would have told Mr. Dumonte that his signing a card would lead to a representation vote.

32. We do not believe Mr. Hefferton represented that Tim Dixon had already joined the union when on February 12, 1989 he asked Mr. Doherty whether he wished to join. Mr. Doherty's support was not needed. There would have been no reason for Mr. Hefferton to say anything about whether Mr. Dixon had joined. Even if he had, that would not lead us to discount the membership evidence before us. The Board does not ordinarily concern itself with the social pressures employed by a union's supporters and opponents during an organizing campaign, so long as those pressures do not amount to intimidation or coercion or otherwise interfere with the ability of employees to make their own decision. The truth or otherwise of representations made as part of either side's sales pitch is not a matter of particular concern when the representations relate to matters about which employees are able to ask their own questions and form their own judgements. Here, the alleged representation was something Mr. Doherty was able to and did in fact check out himself.

33. With respect to the transaction between Mr. Hefferton and Mr. Dehnicke, we are persuaded on a balance of probabilities that it occurred on the Friday following the terminal date. Whether it occurred then or on the previous Friday, however, the critical question is whether we believe that Mr. Hefferton (or any other organizer, for that matter) used bribery to collect any of the membership evidence on which the trade union relies in support of its application for certification. We are not persuaded that he (or any of them) did. We accept his evidence that the transaction with Mr. Dehnicke was a joke and that neither he nor any on-looker would have imagined that Mr. Dehnicke would join the union in order to get a free pass to Wonderland.

34. Before turning to the question whether the alleged interference with the petition warrants directing a representation vote, we are bound to observe that a conclusion that organizers interfered with the circulation of the subsequent petition would not itself logically support the proposition that there had been impropriety in the earlier solicitation of membership evidence. We were satisfied that the membership evidence submitted by the trade union demonstrated that the employees signatories wished to be represented by the trade union at the time they signed the applications.

35. The role of statements in opposition to certification --"petitions" as they are generally called -- is described in *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at para-

graph 15 and following. Rather than quote at length from that or any other Board decision, we think it would be more appropriate to the purpose of this analysis to set out here what the Board tells employees about "petitions." In any certification application in which there is a possibility of certification without a vote, the Notice to Employees of the application for certification (Form 78 in the Construction Industry, Form 6 otherwise) includes the following information:

> 4.--(1) The Board will not hear evidence or representations of employees objecting to certification of the applicant unless one or more documents, sometimes referred to as petitions, expressing objection to the certification of the applicant are filed with the Board.
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> (2) A document referred to in subsection (1),
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> (a) must be signed by the objecting employee or employees;
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> (b) must be,
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> (i) received by the terminal date if sent other than by registered mail, or
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> (ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail; and
>
> (c) must be accompanied by the name of the employer concerned and the return mailing address of the employee or employees filing the document or of the representative of the employee or employees.
>
> (3) The objecting employee or employees or a representative of the objecting employee or employees MUST ATTEND THE BOARD'S HEARING AND PRODUCE A WITNESS OR WITNESSES who, from personal knowledge and observation, can describe the circumstances in which each document was prepared, circulated and signed, and verify each signature.
>
> *No oral evidence of employee objection to certification of the applicant will be accepted by the Board except to identify and substantiate written evidence which complies with these requirements.*

In addition to the posting of a Notice of Application in the appropriate form, the Registrar also directs the posting of another Notice to Employees which informs employees about their rights under the *Labour Relations Act* generally and the nature of a certification application in particular. The following portions of that poster-sized Notice ("the poster") refer directly to "petitions" and their role in the certification process:

> **What percentage of the employees in the bargaining unit must belong to the trade union for it to be certified?**
>
> Generally, if less than 45 percent of the employees in the unit are members of the trade union, the Board will dismiss the application. If more than 55 per cent of the employees are trade union members, then the Board will usually certify the trade union without a representation vote. If between 45 and 55 per cent of the employees have joined the trade union, the Board must conduct a representation vote. The Board will then certify the trade union only if more than half of the ballots cast are marked in favour of the trade union.
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> • • •
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> **There are three important exceptions to these rules:**
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> • • •
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> **Thirdly,** the Board has a discretion to order a representation vote where it is satisfied that a document opposing the certification of the trade union is received by the Board by the terminal date or mailed to it by registered mail by that date and is signed voluntarily by a sufficient num-

ber of employees so as to raise a doubt whether the union continues to have the unqualified support of more than 55 per cent of the employees in the bargaining unit.

Example: There are 100 employees in the unit determined by the Board to be appropriate. The union files 60 valid membership cards by the terminal date. The union would generally need 56 to be certified without a vote. A document opposing the union signed by 30 employees is filed by the terminal date. The Board will determine if any of the 30 employees opposing the union had previously signed membership cards, as this would indicate that they may have changed their minds. If none of the 60 original supporters had signed the document opposing the union then those 60 still want the union. Thus since more than 55 per cent still want the union, the Board would generally certify without a vote. But if 20 employees who originally signed membership cards have also signed the document opposing the union, then only 40 would clearly still support the union (i.e. 40%).

Provided the Board was satisfied that the documents opposing the union were voluntarily signed, it would generally order a vote, because there would be some doubt that over 55% of the employees continue to want the union to represent them.

Can an employer suggest that employees file a document opposing the union or assist in its preparation?

The Board will disregard any such document that is not clearly a voluntary expression of the signing employee or employees and is not entirely free from actual or perceived employer influence.

Documents recording employee opposition to certification of a union are often referred to as "petitions" in proceedings before the Board. There is no standard form. Whatever form the document takes, it must be signed by the employee or group of employees concerned. As a minimum, the document must name the employer and union involved and state clearly that the employee or employees who have signed it are opposed to the applicant union being certified.

How do you prove that a document opposing the union does not have management support?

If documents opposing the union contain a sufficient number of signatures of persons who also signed union cards that it may prompt the Board to hold a vote, the Board will call upon the objecting employees to prove that the signatures on the document were voluntary.

A representative of the signing employees must appear and call witnesses to testify under oath about how the document opposing the union originated (whose idea it was who drafted it and where) and about the manner in which each of the signatures was obtained. This means that evidence must be given about the circumstances under which each employee signed the document by someone who was present at the time. Through all this, the Board makes certain that the names of the employees on the document are not revealed to the employer or the union. Reference is made only to a number placed beside each of the signatures by the Board. The persons who present the evidence at the hearing will be questioned by the Board and may be questioned by the representatives of the union and the employer. If at the end of the enquiry the Board is not satisfied that the signatures on the document were voluntary expressions of the employees who signed, the document will be disregarded.

[the first sentence of the last paragraph appears in italics in the original]

36. As these portions of the poster indicate, a petition in opposition to certification of an applicant trade union will only affect the outcome of that application if it has been voluntarily signed by a numerically relevant number of employees on whose earlier applications for membership the applicant trade union relies. A written expression of opposition to its certification by an employee who has recently applied for membership in a trade union represents what some of the decisions refer to as a "sudden change of heart". Its voluntariness may be put in doubt if, as happens from time to time, their employer has brought pressure on the employees after learning of the application or if, as also happens from time to time, those circulating the petition have done so in a

manner which suggests to employees that the employer will learn the identities of those who do and do not sign. The voluntariness of a petition is ordinarily the subject of careful scrutiny in a certification application. As both the formal Notice of Application and accompanying poster indicate, those who would have the Board give weight to a petition are obliged to participate personally or by a representative at the hearing of the application, and they must ensure that there are witnesses in attendance at the hearing who can attest from personal knowledge as to the circumstances of origination and circulation of the petition document. Neither these opponents nor any other party to the application is obliged to retain and be represented by a lawyer. Given the adversarial and sometimes complex nature of certification proceedings, the parties to them, including objecting employees, are often represented by lawyers.

37. Counsel for the respondent relies on the Board's decision in *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. Apr. 346. That was a certification application in which the applicant trade union filed membership evidence with respect to more than 55 per cent of those in the bargaining unit. The employer argued that the Board should nevertheless conduct a representation vote because intimidation was used to prevent the circulation of a petition in opposition to the applicant. In issue was the behaviour of one Provencal, husband of the union's chief employee organizer, toward Pat Newton, an employee who had begun to circulate a petition in opposition to the application at the time of the incident in question. The following portion of the Board's decision describes the incident and the Board's reaction to it:

> 13. Provencal confronted Newton at her place of work. The evidence accepted by the Board establishes that Provencal told Newton that if she continued to circulate the petition she would get into big trouble. He said that if she wanted trouble she would get it. Provencal admitted that he spoke to Newton in an angry tone of voice and that he intended to frighten her into ceasing her efforts in opposition to the trade union. He was evidently successful in doing so. The Board accepts Newton's testimony that after Provencal left she ripped up the petition because she was scared.
>
> 14. *Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 and *Du Pont of Canada Limited*, [1960] OLRB Rep. Jan. 361 are two cases where the Board has dealt with allegations of wrongful activity aimed at interrupting the circulation of a petition. In both cases the Board dismissed the complaints and certified the union on the grounds that the acts complained of were not of a such a nature as to prevent through intimidation the subsequent circulation of the petitions. In *Kendall Company (Canada) Limited* the circulator was at the company gates openly circulating another petition the day after his original petition was ripped up by an employee collector. The circulator was so far from being intimidated that on the following day he sought to provoke an incident in front of two employees with whom he was talking. In *Du Pont* the Board was satisfied that the employees ceased circulating their petitions because of the union organizer's suggestion that the petitions might ultimately jeopardize the jobs of some of their fellow employees and not because of any acts of intimidation directed against them. The Board emphasized that it was not intended to act as a censor of mere social pressures exerted either for or against a union.
>
> 15. Unlike the incidents in *Kendall* and *Du Pont*, the activities of Conrad Provencal, by his own admission, were designed to intimidate Newton and scare her into destroying the petition. Whether or not these tactics constitute a violation of section 61 of the Act is not determinative of the matter. Under The Labour Relations Act employees are given an opportunity to state their opposition to a union's application for certification by filing a petition with the Board. A petition which meets the requirements of timeliness and form set out in Rule 48, displays sufficient overlap with the membership evidence and is found to be a voluntary statement of desire may leave the Board in doubt as to the true intentions of the membership evidence submitted to the Board, the Board exercises its discretion under section 7(2) of the Act and orders a representation vote to ascertain the true wishes of the employees.
>
> 16. In this case, Provencal's effective scare tactics which interrupted the circulation of the petition clearly exceed the bounds of acceptable pressure. Although Provencal was not a member of

> the applicant union he was the husband of the key employee organizer. Moreover, he was himself recognized as an active and effective participant in the organizing campaign as evidenced by the fact that Lafond as well as his wife called upon him to deal with the Newton petition. In view of his role in the initiation of the orgnizing campaign, his position as a union steward and an outsider, his confrontation with Newton cannot be brushed aside as an isolated incident of a hothead. His actions deprived employees of an opportunity to express their wishes to the Board through the Newton petition. Having regard to all the circumstances of this case and the means by which the petition was interrupted, the Board finds that it is left in doubt as to whether the membership evidence filed was, as of the terminal date, an accurate expression of the wishes of the employees. To resolve that doubt the Board hereby orders the taking of a representation vote among the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

38. As appears from this passage, the panel which decided *St. Michael Shops* considered whether the behaviour complained of actually interrupted the circulation of the petition. Having concluded that it did interrupt the circulation of the petition, the Board considered whether the behaviour in question exceeded the bounds of "acceptable pressure". In that connection, it considered whether the behaviour in question was "designed to intimidate" the person circulating the petition into ceasing that activity.

39. Darrell Dexter was the petition circulator in this case. The alleged improper behaviour toward him was that of Messrs. Hefferton and Hines in asserting to him that he would be going to court, that he would need a lawyer and that all this would cost him money. It is apparent that this Board is the "court" to which they were referring and that that is what Mr. Dexter understood them to mean: he responded to their assertions by telephoning the Board to find out whether he needed to have a lawyer at the hearing of the certification application. He was told he did not. Mr. Dexter had to attend the hearing or hearings if he wished his signature collecting activity to be of any use in opposing the union: he and all of the other employees would have known that from reading the Board Notices posted in the workplace. The need to attend a hearing and the financial implications of doing so were necessary consequences of Mr. Dexter's decision to oppose the union.

40. The comments made by Messrs. Hefferton and Hines were not threats to institute other litigation against Mr. Dexter in retaliation for his pursuing his rights, nor were they threats to abuse the courts' or this Board's process in order to create artificial barriers or costs to the assertion by Mr. Dexter of his rights. On their face, these were assertions about the consequence of Mr. Dexter's intention (which they were entitled to assume he had) to participate in the hearing of the certification application and oppose the union's application. To the extent they misstated those consequences, by saying that Mr. Dexter had to have a lawyer, Mr. Dexter knew otherwise. Most importantly, Mr. Dexter was not deterred by these statements from continuing to circulate the petition. Despite his assertions that he was deterred, the fact show that he did continue to circulate the petition.

41. During the hearing of evidence in these matters, counsel for the respondent took the position that the effect on Messrs. Dexter and Dumonte of their conversations with Messrs. Hines and Hefferton was the only matter we should take into consideration in assessing the appropriate response to those events. During her examination in chief of Mr. Hines, counsel for the union asked him why he told Mr. Dumonte that he might have to go to court. Counsel for the respondent objected to this question, on the ground that Mr. Hines' state of mind was irrelevant. During argument on that objection, we observed that there had not yet been any suggestion that Mr. Hines acted out of any inappropriate motive. We told counsel for the union that we thought it inappropriate to anticipate such an attack on the witnesses' motivation before it had been made. We nei-

ther accepted or rejected the respondent's assertion that motivation was not a relevant consideration. Counsel for the union did not question Mr. Hines further in chief about the motivation behind his discussion with Mr. Dumonte. When counsel for the respondent objected to her asking him about his motivation in telling Mr. Dexter that he needed a lawyer, she withdrew the question. Counsel for the respondent did not cross-examine Mr. Hines with respect to his motivation in speaking to Messrs. Dumonte and Dexter as he did. In all the circumstances, we are entitled to assume that when Mr. Hines told Mr. Dumonte that he might have to be a witness he believed that there might be a real need to call Mr. Dumonte as a witness.

42. The Board ordered a vote in *St. Michael Shops* because the improper conduct of someone closely connected with the union's organizing campaign had interrupted the circulation of a petition, with the result that the Board was left in doubt about employee wishes as of the terminal date. There, the petition was interrupted by intimidation of the petition circulator. Another way a petition could be interrupted is by intimidating potential signers of it, particularly those whose signature on the petition would be significant because they had previously signed a membership application. Although we concluded that the petition circulator here had not been improperly deterred from circulating his petition, we had to consider whether other potential petition signers would have been improperly deterred from expressing their wishes by that means as a result of the behaviour of the union organizers toward Messrs. Dexter, Dumonte and other petition signers.

43. The first observation which should be made in this connection is that the organizers made themselves vulnerable to this charge by their heavy handed and successful efforts to find out who had signed Mr. Dexter's petition. To the extent they became aware of the organizers' determination to get that information, signers and potential signers would have been concerned about the use to which organizers might put that information. Once the union organizers knew who had signed the petition, the content of any subsequent discussion between an organizer and a petition signer was something about which any potential signer would be sensitive. If such a conversation included a suggestion of physical violence or even unspecified "big trouble", that would be a matter of concern to the Board. The Board might direct a vote if it were satisfied that such a conversation was likely to have come to the attention of a significant number of potential petition signers. We are satisfied that in this case there were no express or implied threats of physical violence or of unspecified "trouble".

44. One or two of the signers were asked why they were opposing the union when it did not appear they had a continuing interest in the workplace. That kind of conversation falls well within the range of permissible "social pressure". The conversation which Mr. Hefferton acknowledges having had with Mr. Dexter involved the assertion by Mr. Hefferton that certain actions of Mr. Dexter's were illegal or improper. Without denying the possibility that assertions of that type may in some circumstances go beyond the bounds of acceptable social pressures, we concluded that this conversation did not.

45. We are satisfied that Mr. Hines' assertion to Mr. Dexter that he would be going to court and would need a lawyer was a statement of Mr. Hines' belief about what Mr. Dexter would have to do if he persisted in his plan to oppose certification at the hearing of the union's application. He made no suggestion that the need for a lawyer, the cost of the lawyer or the loss of wages which might flow from having to attend the hearing were anything other than the necessary consequences of Mr. Dexter's having decided to oppose the union. There was no suggestion, for example, that the union would drag out the hearing so as to artificially increase the cost to Mr. Dexter of his opposition. There was no suggestion that the union would make any sort of vexatious claim in the proceedings or initiate any other vexatious proceedings so as to artificially inflate the cost to Mr. Dexter of his opposition to the union. In the circumstances, we do not find that conversation to

have exceeded acceptable bounds. The same would apply to the other conversation between Mr. Dexter and Mr. Hefferton, if it occurred as alleged by Mr. Dexter. It is unnecessary for us to consider whether these conversations were likely to have come to the attention of potential petition signers, as we could not be concerned even if they had.

46. When the voluntariness of a petition is in issue, trade unions not infrequently call employees who were approached to sign the petition to testify as to the circumstances in which that occurred. Mr. Dumonte was a person who had been approached to sign a petition. The evidence before us is that Mr. Dexter obtained his petition signatures during working hours in his office in the plant, which office is next door to the office of a member of management. In those circumstances, and bearing in mind that there was no attack on Mr. Hines' motivation in telling Mr. Dumont that he would have to be a witness, we should deal with that conversation on the footing that Mr. Hines had a genuine belief that there was some good reason why the union might want to call Mr. Dumonte as a witness. We are not satisfied that Mr. Hines told Mr. Dumont he would need a lawyer. While it does concern us that Mr. Hines coupled his observations about Mr. Dumonte's being a potential witness with the possible cost to Mr. Dumonte of being called, Mr. Hines did nothing to suggest that the union's ability to compel the attendance of employees as witnesses would be used for the purpose of imposing a financial penalty on anyone who opposed its application for certification. We would be very concerned if the threat of that sort of abuse of this Board's process formed any part of pressure brought by union organizers on potential petition signers. The respondent did not suggest that that was Mr. Hines' intended message. It put its argument entirely on the basis that the mere assertion that Mr. Dumonte might have to go to a hearing and suffer an associated financial cost would have a deterrent effect and that this deterrent effect was enough to warrant our conducting a vote even in the absence of a numerically relevant petition. If the Board took that approach the ability of a trade union to investigate and call witnesses with respect to the issue of the voluntariness of a petition would be unduly restricted.

Allegations of Employer Wrongdoing

47. The union's complaint in File 2927-88-U alleged that on or about February 22, 1989, employees were summoned individually to meetings with a representative of the employer at which they were asked about their involvement in the union's organizing drive. The employer filed a detailed Reply, in which it acknowledged that on February 22 and 23, 1989, employees at the Nobel plant were asked to speak to Mr. John McGlinchey, who is described as "Counsel for the Respondent." It claimed it had been informed of union misconduct in connection with the organizing drive and that Mr. McGlinchey's investigation had been undertaken in order to ascertain whether and to what extent such misconduct had occurred. It said that each interviewee had been advised that the interview was voluntary and that nothing he said would affect his job or result in "reprisals." The respondent alleged that no employee was asked about his or her involvement in the union's organizing drive.

48. The allegation in the union's complaint is one in respect of which subsection 89(5) of the Act imposes a reverse onus or burden of persuasion on the employer. The Board's standard practice at the hearing of a complaint to which subsection 89(5) applies is to have the respondent proceed first to adduce its evidence with respect to the matters in issue: see Practice Note No. 1, paragraph 7. The outstanding issues in the certification application and the issues raised by the employer's section 89 complaint where also issues in respect of which the employer would have been expected to proceed first.

49. When the hearing of these matters began, the trade union sought to add John McGlinchey and John Roberts as respondents to its section 89 complaint, alleging that each was a "person

acting on behalf of an employer" when he questioned employees with respect to their participation in the organizing campaign, so that that behaviour should result in their being liable together with their employer for breaches of sections 64, 66(a), 66(c) and 70 of the Act. Bearing in mind the lateness of notice of this request and the fact that subsection 89(5) applies to employers but not to persons acting on behalf of an employer, we advised counsel for the trade union that if the amendment were granted we would require the trade union to proceed first with respect to the subject matter of its complaint, but that if the employer remained the only respondent to that complaint it would be required to proceed first with respect to all of the matters in issue, including those raised by the union's complaint. After consideration, counsel for the trade union withdrew the request to add Messrs. McGlinchey and Roberts as respondents to its complaint. In the result, the respondent was clearly on notice that its case-in-chief would have to include any evidence it wished to put before the Board in support of the proposition that no employee had been questioned by Mr. McGlinchey or Mr. Roberts about his or her involvement in the union's organizing drive.

50. Except for Mr. McCullough, whose testimony was restricted to matters relevant to the "build-up" issue, the witnesses called by the employer during its case-in-chief were all employees in the bargaining unit. One of those employees was questioned about what had taken place when he was interviewed on February 22nd or 23rd. The witness answered that he had not been questioned about whether he had joined the union, attended union meetings or supported the union in any way. The employer completed its case-in-chief without having called either Mr. McGlinchey or Mr. Roberts as a witness.

51. Two of the union's witnesses testified about having been interviewed by Mr. Roberts and Mr. McGlinchey. Rick Eldridge said he had been asked to go upstairs in the plant, where he met Mr. Roberts. After telling Mr. Eldridge he did not have to answer, Mr. Roberts asked him whether he had attended a union meeting or been asked to attend a union meeting. He also asked Mr. Eldridge whether he had signed a union card. Mr. Eldridge did not answer those questions. Mr. McGlinchey then joined them. The questions he asked Mr. Eldridge included those asked earlier by Mr. Roberts: whether he had attended a union meeting, whether he had been asked to attend a union meeting and whether he had signed a union card. Mr. Eldridge answered "no" to all of these questions. At the end of the interview he was presented with and asked to sign a document stating that before being interviewed by Mr. McGlinchey he had been told that, among other things, his answers to Mr. McGlinchey's questions would not affect his job, that "regardless of my answers or what I said, there would be no reprisals" and that "my participation in the interview was strictly voluntary, and I was informed that I could decline to answer any questions and could leave at any time." Mr. Eldridge signed this document. He did not remember being told that his answers would not affect his job or that there would be no reprisals. He did recall having been told that his participation in the interview was voluntary and that he could decline to answer any question. He signed the document because he was nervous and wanted to get out of the meeting as quickly as possible.

52. John MacDonald also testified about being interviewed. He was told to go upstairs. When he did so, he found Mr. Roberts, who took him into a room with Mr. McGlinchey. Mr. McGlinchey asked several questions. Among them were whether he had been approached to sign a union card and whether he had in fact signed a union card. Mr. MacDonald was asked to and did sign a document in the same form as the one signed by Mr. Eldridge. Mr. MacDonald did recall being told that anything he said would not be used against him.

53. The employer called Mr. Roberts as a reply witness. Counsel for the union objected when counsel for the employer asked Mr. Roberts if he had asked Mr. Eldridge whether he had attended a union meeting. Counsel for the union argued that the employer was splitting the case

which it ought to have presented in chief. Counsel for the employer argued that this was simply a reply to the evidence of Eldridge about what he had been asked. We gave the following oral ruling:

> Our procedural direction was that the employer should present its evidence first with respect to all matters in issue, including the allegations put in issue by the trade union in its complaint. Those issues included the question whether Mr. McGlinchey or Mr. Roberts or both had asked employees individually about their activities in relation to the union organizing campaign. Those individuals were available to testify. After being so directed, there was no suggestion by the employer's counsel that in order to comply he needed to know which employees were allegedly so questioned.
>
> The employer chose not to call Mr. Roberts or Mr. McGlinchey in chief, choosing to rely (counsel now explains) on the favourable evidence given during cross-examination of one of its employee witnesses as to the circumstances of that employee's interview. In these circumstances, to now allow the employer to introduce evidence of Mr. Roberts in reply with respect to his conversations with one of the union witnesses on this issue would be to allow the employer to change the procedure which we determined at the outset. The employer was to offer its evidence on the issue whether Mr. Roberts had asked any employee about his involvement in the union organizing campaign during its evidence in chief. To attempt to address any aspect of that question now is not in these circumstances proper reply.

We did not permit any further questioning of Mr. Roberts about whether he or Mr. McGlinchey had questioned Mr. Eldridge or Mr. MacDonald about their involvement in the union's organizing campaign.

54. The evidence before us established that two employees had been questioned by the respondent's agents about whether they had joined the union or participated in its activities. Section 111(1) of the Act protects trade union membership records from disclose. In a paper published in 1965, the then chairman of the Board made these observations in the course of his explanation of the reason for that section:

> An important factor that must be taken into account in framing labour relations legislation is that employees are fearful, whether for good reason or otherwise, that if their employer suspects they are members of a trade union, he may discriminate against them in their employment. Although there are prohibitions in The Labour Relations Act against such discrimination and although remedies are provided for cases in which discrimination is shown to exist, the fact remains that some em,players do from time to time engage in discrimination in so subtle a fashion that it is difficult, if not impossible, to obtain and present proof of it to the Board in a manner that will enable the Board to act on it. In these circumstances, to insist on full disclosure to an employer or to his representative of the names of employees who joined the union might well in practice render nugatory the freedom guaranteed by the Act to employees to join the trade union of their choice and, in proper circumstances, to have that union bargain on their behalf with their employer. The Legislature has therefore seen fit to lay down the general rule that membership evidence is not to be revealed to the parties opposed in interest to the trade union.

(J. Finkleman, the *Labour Relations Act Board and Natural Justice* (1965, Queen's University, Kingston) at p. 31). Those observations remain apt. The natural tendency of an employer's questioning an employee about whether he or she has joined a trade union is to excite the fear referred to in this passage. Excitement of that fear inhibits employees' exercise of their statutory rights and interferes with the performance by trade unions of their representative function. If there are circumstances in which such employer questioning has a valid purpose, they have not been demon-

strated here; the questioners were not called to explain their actions. Having regard both to subsection 89(5) of the Act and to the principle that a person must be taken to have intended the natural consequences of his actions, we found that the respondent violated sections 64 and 66(c) of the Act. While this was not in all the circumstances the most heinous of violations, it was a violation nevertheless, and one for which the posting remedy seemed to us an appropriate and adequate remedy.

The Employer's Unfair Labour Practice Complaint

55. The allegations of wrong doing raised by the employer in the certification application were also asserted by it in a separate complaint under section 89 of the Act in which it named "Employees of the Complainant" as the persons who were allegedly dealt with contrary to the Act. The employer's standing to raise those allegations as respondent in the certification application was not questioned: see *Bennett Paving Materials Limited*, [1980] OLRB Rep. 1579. No doubt because the respondent had standing in that capacity, we were not asked to rule on whether the employer had standing to act on its employees' behalf in a complaint to the Board about alleged violations of their rights by the union which was applying for certification as their exclusive bargaining agent. As no such violations were established, the employer's complaint could be dismissed without considering that standing issue.

56. We do wish it clear, however, that the question of standing troubled us. No one can pursue a complaint about the violation of another's rights under the Act except with the authority of the aggrieved person, as the Board observed in *Cuddy Food Products Ltd.*, [1989] OLRB Rep. Feb. 126 at paragraphs 14 and 15:

> 14. Form 58, the prescribed form by which complaints under section 89 are initiated, specifically contemplates a complaint's being filed on behalf of a person or persons other than the named complainant. Such persons are described in the form as "grievors". When a complaint is filed in that way, the complaint is the grievor's; he or she is considered to have control over it: *Norak Steel Construction Ltd.*, [1968] OLRB Rep. Sept. 638. The form requires that the names, addresses and telephone numbers of such grievors be listed in paragraph 2 of the complaint. The clear intent of the form is that complainants identify clearly the persons whose treatment is the subject of the complaint.
>
> 15. Where a complainant names another as grievor, the Board is concerned that the complainant has the grievor's authority to represent his or her interests. Except where the complainant is a trade union with bargaining rights for a unit which includes the grievor, the existence of that authority will not be assumed: *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197.

There was no evidence that the employer was authorized by any of its employees, to file and prosecute a complaint on their behalf. An employer's soliciting or even just accepting authority to act on its employee's behalf against a trade union which is seeking to organize them raises serious questions which are best left unraised.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; May 7, 1990

1. I concur with the findings and the rationale with respect to:

   i) Build-up issue;

   ii) Allegations of employer's wrongdoing;

   iii) The employer's unfair labour practice complaint.

2. I do not however, concur with the majority in respect to the issue of *allegations of misconduct by the union.*

3. I was persuaded that the tactics employed by Mr. Hefferton to solicit signing of union cards from Mr. Doherty was something less than forthright and could not be categorized as aggressive salesmanship.

4. Mr. Hefferton's offer of a trip to Canada's Wonderland to Mr. Dehnicke if he would sign a union card is also in my view highly suspect of the methods used in recruiting employees to sign union cards.

5. Mr. Hefferton's approach to Dennis Dumonte on January 31, 1989 left Dumonte with the impression that signing of a union card was a step in the direction of getting a *vote* i.e. to express his feeling through a secret ballot.

6. Mr. Stevens said to Mr. Doherty on March 10, 1989 to keep his mouth shut or he would get a slap in the side of the head. Albeit this encounter took place after Mr. Doherty saw Stevens riding on the back of a lift truck. I am not convinced that his actions were not an extension of his intimidating method of organizing.

7. The incident of Hines in Dexter's office demanding to see the petition Dexter's refusal to show the petition to him unless he was willing to sign. Hines stated he and Dexter would need a lawyer because he was going to be taken to court.

8. Following the encounter with Hines - Hefferton came into Dexter's office and tried to see the petition. He was advised of Dexter's conversation with the Registrar - Hefferton repeated the threat made by Hines to Dexter that he was going to need a lawyer.

9. Sam Laccose another member of the organizing committee visited Dexter's office that day as well. He through devious means persuaded Dexter to show him the petition. Laccose examined the signature of the petition before leaving. Mr. Dexter says shortly thereafter, petition signers told him they were being threatened and also told they would be summons to court.

10. Mr. Dexter collected signatures on his petition on February 10, 1989. He testified that he decided not to solicit more signatures after being informed that those who had signed were being harassed by union supporters. Although Dexter brought the petition in to work the following Monday and had two more employees signed one who in turn returned to take his name off a few minutes after the signing.

11. It appears evident to me from these proceedings that the union organizers were most forceful in their endeavours to bring the union into the plant, forceful to the point that they would deny to those in opposition to the union the same democratic rights of expression that they themselves as supporters of the union wished to exercise.

12. It further appears to me that the actions of the union organizers transgressed the rights of employees to respond to their union organization campaign.

13. In conclusion I would have directed a vote in accordance with section 7(2) of the Act. This would allow the employees concerned to secret register their expression for or against the union - something they have been prevented from doing through the actions of the in plant union organizers.

0026-90-G; 0027-90-G; 0028-90-G; 0029-90-G; 0030-90-G; 0031-90-G; 0032-90-G; 0033-90-G; 0034-90-G; 0035-90-G; 0036-90-G; 0037-90-G; 0038-90-G; 0039-90-G Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and **Halton Forming Ltd.,** Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Mur-Wal Forming Inc., Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Orta Forming & Const. Limited, Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Parkwall Forming Ltd., Respondents; Labourers' International Union of North America, Local 183, Applicant v. Teskey Construction Co. Ltd., Respondent; Labourers' International Union of North America, Local 183, Applicant v. Malnic Contracting Inc., Respondent; Labourers' International Union of North America, Local 183, Applicant v. Baccardi Foundations Ltd., Respondent; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and A.R.G. Construction Corporation, Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Cedar Forming Limited, Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Greenwall Forming Limited, Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Peel Forming Limited, Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Poured Wall Corp. Ltd., Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Toronto Zenith Contracting (1982) Ltd., Respondents; Labourers' International Union of North America, Local 183, Applicant v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Tru-Wall Group Limited, Respondents

Construction Industry - Construction Industry Grievance - Collective agreement requiring employers to make remittances to union's benefit fund for purchase of, amongst other things, OHIP - *Employer Health Tax Act* imposing tax on employers and eliminating the payment of OHIP premiums - Whether employers are relieved from the obligation to make payments to the fund which are referable to OHIP premiums - Doctrines of frustration and unjust enrichment not applicable - Employers not entitled to abatement of their obligation to make remittances in full

BEFORE: *Owen V. Gray,* Vice-Chair, and Board Members *W. Gibson* and *P. V. Grasso.*

APPEARANCES: *S. B. D. Wahl* and *J. Steffanini* for the applicant; no-one for the respondents in 0030-90-G, 0031-90-G and 0032-90-G; *E. T. McDermott* for the other respondents.

DECISION OF VICE-CHAIR, OWEN V. GRAY AND BOARD MEMBER P. V. GRASSO; May 16, 1990

1. Each of the 14 employers named as respondents in these referrals to arbitration under section 124 of the *Labour Relations Act* is party to a collective agreement with the applicant trade union governing the employment of persons engaged in concrete forming in low rise residential construction. Schedule "A" to each of those agreements contains the following provision:

> 7.01 The Employer agrees to pay the sum of one dollar and thirty cents ($1.30) for each hour worked into Local 183 Members' Benefit Fund, jointly administered by an equal number of Employer and Union Trustees, for the purpose of purchasing weekly indemnity, life insurance, major medical, dental care, Ontario Health Insurance Plan (O.H.I.P.) or similar benefits for the employees covered by this Agreement, represented by Local 183, Labourers' International Union of North America.

These agreements have effect from May 1989 to April 1991. After they were made, the *Employer Health Tax Act, 1989* (now S.O. 1989, c. 76) was given first reading. Since that Act came into force on January 1, 1990, each of the respondents has reduced its payments under this provision by between 40 and 50 cents per hour. The issue in these referrals is whether they are entitled to that or any abatement of their obligation under the subject provision as a result of the enactment of that legislation.

2. Counsel for the applicant sought to introduce evidence about the negotiation of the terms of the present and previous agreements as between it and The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity, which represented 11 of the 14 respondents in the last round of collective bargaining. He said the evidence was relevant and admissible because the collective agreement provision in question suffers from an ambiguity which, if not patent, would be demonstrated by the evidence he sought to introduce. Counsel for the respondents argued that there was no ambiguity, and objected to our receiving the evidence.

3. An arbitrator is entitled to resort to extrinsic evidence to determine whether there is a latent ambiguity in the language of a collective agreement as well as to resolve the ambiguity: *Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Inc.) et al.,* [1969] 1 O.R. 469; *Re Noranda Metal Industries Ltd., Fergus Division and International Brotherhood of Electrical Workers, Local 2345 et al.* (1983), 44 O.R. (2d) 529 (Ont. C.A.). When it is suggested that there is a latent ambiguity in a relevant provision, an objection to the reception of extrinsic evidence cannot be dealt with without knowing what facts it is said the evidence would establish, so that it can be determined whether proof of those facts would establish a latent ambiguity.

4. Having heard counsel for the applicant describe the facts which he said his extrinsic evidence would establish, it became apparent that full argument on the objection would include a good deal of the argument on the merits. After discussion, counsel agreed that we should hear their argument on the merits on this basis: if persuaded that proof of the matters alleged by counsel for the applicant could affect the result, we would so advise the parties and resume the hearing for the purpose of hearing the evidence of all parties with respect to those allegations; otherwise, we would decide the matter on the basis of the argument and the evidence already before us. In the

result, we are not persuaded that proof of the matters alleged by counsel for the applicant could affect the result. This, then, is our decision on the merits.

5. The Ontario Health Insurance Plan ("OHIP") pays for a wide range of hospital and medical services for Ontario residents insured under the Plan. For many years before the *Employer Health Tax Act* came into force, the *Health Insurance Act* (now R.S.O. 1980, c. 197, as amended) and regulations thereunder required that each single adult and each family insured by the Plan pay a monthly premium for coverage. If an employer had 15 employees or more, the employees constituted a "mandatory group". Members of a mandatory group were obliged to be or become insured. Their employer had to deduct the premium from each such employee's wage and remit it to the General Manager of the Plan, unless the employee fell within a category exempt from payment of a premium, such as a spouse of an insured person. Under the *Health Insurance Act*, however, each employee member of a group was primarily liable to pay the premium for his or her own coverage.

6. The *Health Insurance Act* contemplated the formation of collector's groups: organizations of persons who paid their OHIP premiums through a collector designated by the group. An employer was not obliged to deduct premiums from the wages of an employee who made a written request for exemption on the ground that he or she was insured through a collector's group. Counsel for the 11 respondents who appeared at the hearing of these referrals (hereafter "counsel for the respondents" and "the respondents", respectively) suggested that the employees for whom the Local 183 Members' Benefit Fund ("the Fund") paid OHIP premiums before January 1990 constituted a collector's group. This was neither admitted nor denied by counsel for the applicant.

7. It is common ground that before January 1990, the Fund used a portion of the remittances to it under the provision in question to pay OHIP premiums for those employees covered by the collective agreements who were not otherwise insured. Counsel disagree about whether there would or could have been circumstances in which an employer covered by one of those agreements would have been obliged to deduct OHIP premiums from the wages of a new hire for a period of time while also making remittances under the subject provision in respect of his hours of work. The mechanics of dealings between the Fund and the employers covered by the subject collective agreements on the one hand and the OHIP administration on the other was not dealt with in evidence.

8. The full title of the *Employer Health Tax Act, 1989* is "An Act to impose a Tax on Employers for the purpose of providing for Health Care and to revise the requirements respecting the payment of Premiums under the Health Insurance Act". It imposes on each employer a tax equal to between 0.98 and 1.95 percent of the total remuneration paid to or on behalf of those of its employees who work at or are paid from or through a permanent establishment of the employer in Ontario. It also repeals those provisions of the *Health Insurance Act* which require or contemplate the payment or collection of OHIP premiums. The effective date of some of the repealing provisions is April 1, 1990, which we presume has something to do with the fact that, under the *Health Insurance Act*, OHIP premiums were to be paid three months in advance of the period to which they applied. The parties' arguments did not focus on that timing complication. The basic premise of the argument on both sides was that on January 1, 1990, the respondent employers' liability for Health Tax had begun to accrue and the Fund had ceased paying for OHIP coverage for their employees.

9. The applicant asked us to receive into evidence certain briefs presented by construction unions and construction employer organizations to the Ontario Legislature's Standing Committee on Finance and Economic Affairs, which reviewed the *Employer Health Tax Act, 1989* before it

was enacted, as well as portions of Hansard recording deliberations of that committee and of the House in committee of the whole with respect to that legislation. This material would show that the plight in which the respondents now find themselves was anticipated during the legislative process, and that construction industry employers unsuccessfully sought an amendment which would relieve them from payment of the tax in these circumstances. Counsel for the applicant does not argue that any of the respondents is bound by the position taken before the legislature on behalf of construction industry employers with respect to the effect of the legislation on employers bound by provisions of the sort in question here. As counsel for the respondents observed in argument, this material adds nothing to what examination of the *Employer Health Tax Act, 1989* reveals: that it does not expressly address the effect it may have on existing arrangements between employers and employees with respect to payment of OHIP premiums and does not purport to alter those arrangements directly.

10. When bargaining a collective agreement, an employer takes into account its current and expected costs of doing business and a trade union takes into account the current and expected costs of living and working of the employees it represents. Once agreement is reached, ensuing economic and social changes may create differences between expected and actual costs of doing business and costs of living and working. Changes in income taxes and other taxes may and often do have that effect, as may changes in government economic and social programs. The bargain the parties make must nevertheless stand for a period of time before either party can require the other to renegotiate it. The parties to collective agreements generally do not agree that an arbitrator or arbitration board can adjust their agreement in mid-term to redress externally induced changes in the parties' economic circumstances. The agreements before us specifically provide that an arbitrator or arbitration board has no power to alter or amend its terms.

11. The respondents seek relief from the obligation to make payments referable to OHIP premiums. They say that the legal doctrines of frustration and unjust enrichment give us the power to grant that relief, and that the coming into force of the *Employer Health Tax Act, 1989* triggers the application of those doctrines.

12. The respondents say that Article 7.01 of Schedule "A" to their collective agreements (hereafter simply "Article 7.01") amounts to an agreement that the trustees of the fund will purchase specific, enumerated benefits, including OHIP, with money provided by them. The trust agreement which governs the Fund is incorporated into the collective agreements by reference by Article 7.04 of Schedule "A". The respondents say that the trust agreement obliges the trustees to purchase OHIP. The provisions of the trust agreement on which they rely for that proposition are these:

> 2.03 The term "*Benefits*" as used herein shall mean group life insurance, accidental death and dismemberment insurance, weekly income for sickness or accident, hospital, surgical, medical and anaesthesia, diagnostic, dental, long-term disability, dependent life, survivor income and other similar benefits to be provided to Employees and/or their beneficiaries or dependents as set forth in the Benefit Plan.
>
> 3.02 The Trust Fund is created, established and maintained and the Trustees agree to receive, hold and administer the Trust Fund for the purpose of providing Benefits in accordance with the Benefit Plan adopted from time to time by the Trustees.

Although no express reference to the Ontario Health Insurance Plan appears in the trust agreement, counsel for the respondents argues that reference to "hospital, surgical, medical and anaesthesia, diagnostic ... benefits" can only mean the benefits provided by OHIP. He argues that clause 3.02 requires the trustees to purchase *all* of the sorts of benefits referred to in clause 2.03, which they could only do by purchasing OHIP benefits.

13. The respondents say that the introduction and enactment of the *Employer Health Tax Act* is a "supervening event" which has frustrated the parties' arrangement by making the purchase of OHIP benefits "illegal". Their counsel cites *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 61 D.L.R. (3d) 385 (Ont. C. A.) in support of the proposition that we can in these circumstances "impose on the parties the just and reasonable solution that the new situation demands" (*op. cit.*, p. 391). That solution, in his submission, would be to relieve the respondents of the obligation to pay that portion of the $1.30 per hour which found its way to OHIP prior to January 1, 1990. He is unable to refer us to any case in which an arbitrator has applied the doctrine of frustration in a dispute about rights under a collective agreement, but cites the application of it in an employment benefits context in *The Ottawa Police Association v. The Corporation of the City of Ottawa, et al.*, (unreported decision, May 22, 1985, Ont. C. A.).

14. Counsel for the respondents also argues that the essential arrangement was that the trustees would remit OHIP premiums as agent for the employers out of money provided by the employers for that purpose. As that purpose can no longer be accomplished, he submits that we should not enforce the continued payment to the trustees of the amount attributable to that purpose because it would only result in the trustees holding that money on a resulting trust for the employers making the payments.

15. Finally, counsel argues that the principle of unjust enrichment should be applied to give the respondents relief. He quotes Goff and Jones, *The Law of Restitution*, (3rd ed., 1986) at page 16, where they say of this principle that

> It presupposes three things: first, that the defendant has been enriched by the receipt of *a benefit*; secondly, that he has been enriched *at the plaintiff's expense*; and thirdly, that it would be *unjust* to allow him to retain the benefit.

He relies on the decision of Mr. Justice Morden in *James More & Sons Ltd. v. University of Ottawa* (1974), 49 D.L.R. (3d) 666, in support of this submission.

16. A good deal of the respondents' argument depends on the proposition that the trustees of the Fund owed an obligation to the respondents to use some defined portion of their payments under article 7.01 to pay OHIP premiums for employees. It does not appear to us that they had any such obligation. Neither the collective agreement nor the trust agreement allocates any portion of the employer remittances to OHIP. Indeed, while the trustees are obliged to use those payments to provide "Benefits", they are not obliged to purchase or spend any particular amount of money on any particular benefit. Their obligation under the trust agreement is simply to ensure that the things they spent money on fall within the definition of "Benefits" in clause 2.03 of the trust agreement.

17. We do not accept that the trustees were obliged to purchase *all* of the sorts of coverage described in clause 2.03 of the trust agreement. If the language of Article 7.01 itself imposes any obligation on anyone other than the employer, it is only to purchase "weekly indemnity, life insurance, major medical, dental care, Ontario Health Insurance Plan (O.H.I.P.) *or* similar benefits" (our emphasis). The use of "or" is inconsistent with an obligation to purchase all of the specified benefits. The word "and" in Article 2.03 of the trust agreement forms part of the phrase "and other similar benefits" in a broad definition of the word "Benefits". The use of such general language is inconsistent with an intention that this definition trigger a positive obligation to purchase everything encompassed by the language used in it.

18. The respondents did not agree to provide OHIP coverage or to pay their employees' OHIP premiums. The Fund cannot be said to have been acting as the employers' agent in remitting

premiums to OHIP. The respondents would not have been obliged to pay their employees' OHIP premiums out of their own pockets if the Fund had not done so. They would only have had to deduct premiums from the employees' wages as required by the *Health Insurance Act*. While it is not a compelling fact, it is interesting that article 5.01 of Schedule "A", which requires that each employee's weekly pay be accompanied by a slip itemizing all deductions, expressly contemplates the possible deduction of OHIP premiums by the employer. This would have been quite unnecessary in an agreement under which the employer was expected to pay the premiums directly or through an agent.

19. The amount payable by employees for OHIP premiums has changed over the years. Further change was a contingency which was not beyond the foresight of parties to collective bargaining. Nothing in the agreements in question here would have obliged the employer parties to increase their payments under Article 7.01 if premium amounts had increased. Under the language of these agreements, the employees bore the risk that premiums would increase before their union got back to the bargaining table. They would have been entitled to the benefit if there had been any mid-contract decrease in OHIP premiums. Nothing in the language of the agreements warrants treating an elimination of premiums differently from a decrease in premiums.

20. In *Victoria Wood Development Corporation Inc. v. Ondrey et al.* (1978), 22 O.R. (2d) 1, the Ontario Court of Appeal reviewed its earlier decision in *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, *supra*. Both cases involved agreements to purchase land which became the subject of restrictive land use planning legislation after the agreements were made and before they were completed. In the earlier case, the restriction prevented the vendor from conveying the land in the manner expressly contemplated by the agreement. In the latter case, they interfered with the use to which the vendor knew the purchaser proposed to put the land, but did not prevent the parties from performing their obligations under the agreement. The Court of Appeal did not consider the latter contract frustrated.

21. In *The Ottawa Police Association v. The Corporation of the City of Ottawa, et al.*, the contest was over the employer parties' contributions to a supplementary pension fund which was being wound up pursuant to a regulation promulgated under provincial legislation which had done away with the need for the fund. The employees' contributions had been returned to them as the regulation required. The issue was whether an earlier agreement between the parties concerning "surpluses" in the plan affected the employer parties' entitlement to the return of their own contributions, which was not expressly addressed by the regulation. The court found that the agreement in question was part of an overall agreement with respect to the creation and maintenance of the supplementary pension fund, and that the subsequent regulation had frustrated that agreement by dismantling the fund.

22. Assuming that the doctrine of frustration can be applied by an arbitration board expressly forbidden by the terms of the collective agreement from altering its terms, we do not think that doctrine applies here. Neither the trustees of the fund nor any of the parties to the subject collective agreements is under any obligation which the *Employer Health Tax Act* prevents them from discharging. The elimination of the employees' statutory obligations to pay OHIP premiums does not destroy the very foundation of the collective agreement or of article 7.01, nor does it make the performance they call for radically different from what the parties contracted for.

23. If principles of unjust enrichment can be applied by an arbitration board, they do not apply here. The linkage between the employees' benefit and the employers' expenditure is not as direct as it was in *James More & Sons Ltd. v. University of Ottawa*, *supra*: the employees' OHIP coverage does not depend on their being employed, nor on whether their particular employer has

paid the tax it owes under the *Employer Health Tax Act*. More importantly, and in contrast with the legislation in question in the *More* case, it was clearly the Legislature's intention that employees be relieved from payment of premiums by deduction from the compensation their employers had agreed to pay them and that employers as a class bear a new burden in relation to the funding of health care. Even if the circumstances fit the first two of the tests set out in the passage quoted in paragraph 15 above, we cannot say that the result is unjust when it is consistent with the apparent intent of the legislation which brought it about.

24. The respondent employers' obligation under Article 7.01 of Schedule "A" of the collective agreements is to pay $1.30 per hour to the Local 183 Members' Benefit Fund. The enactment and coming into force of the *Employer Health Tax Act, 1989*, S.O. 1989, c. 76, did not relieve them of that obligation. The respondents are directed to forthwith remit to the Local 183 Members' Benefit Fund the difference between their remittances under Article 7.01 of Schedule "A" since January 1, 1990 and the full amounts they were obliged to remit in that period, together with interest, as required by the terms of the collective agreements.

25. If the parties are unable to agree on the amounts payable, that question may be the subject of a further hearing and award, and we remain seized with these referrals for those purposes.

DECISION OF BOARD MEMBER W. GIBSON; May 16, 1990

1. I dissent.

2. As referred to in paragraph 7 of the majority decision, it is common ground that the benefit fund used a portion of the remittances to it to pay the O.H.I.P. premium for the employees covered by the collective agreements. This is not surprising, because article 7:01 of schedule "A" to the collective agreement spells out very clearly that the benefits paid for by the employer within the remittance of $1.30 per hour, includes O.H.I.P. premiums. Similarly, article 2:03 of the trust document, although it does not specifically spell out payment of O.H.I.P. premiums as one of the benefits, it does define "hospital, surgical, medical and anaesthesia, diagnostic" as benefits to be provided. These of course are the services provided by O.H.I.P.. After defining the various benefits to be provided out of the trust fund, articles 2:03 adds in these words "*and* other similar benefits to be provided to employees". I interpret this to mean that it is obligatory for the trustees to provide *all* the benefits defined before the word "and", which includes the services provided by O.H.I.P.

3. The majority decision produces the inequitable, in fact grossly unfair result that the employer will now pay twice for his employees O.H.I.P. premiums, once as part of the $1.30 per hour he pays into the benefit plan, and a second time through the payroll tax imposed on him by law under the Employer Health Tax Act.

4. My decision would have been to:

(a) permit the employers to reduce their payment of $1.30 per hour into the benefit plan by the identical amount per hour that the trustees were paying into O.H.I.P.. (This amount is believed to be approximately 40 cents per hour); or

(b) enter into an arrangement whereby the trustees can continue to remit the O.H.I.P. premiums, but, effective January 1, 1990, the payments to be made as *agent* of the employer, so that the employer obligations are met under the Employer Health Tax Act.

5. This would mean that all parties would come out even:

(a) the O.H.I.P. premiums will still be paid for the employees;

(b) the employer pays once, not twice, for these premiums;

(c) the trust fund does not receive a "windfall" enrichment of 40 cents per hour.

6. I do not believe it to be significant that construction employers unsuccessfully attempted to obtain an amendment to the proposed Employer Health Tax Act to adjust for existing benefit plans. With such a multitude of benefit plans out in the workplace, I can see why the Legislature opted to let the parties work this out for themselves, through arbitration if necessary.

7. Also, I put little weight on the point made by counsel for the union, that there is no way the employer would have paid more than $1.30 an hour into the benefit plan if O.H.I.P. premiums had increased part way through the collective agreement. Of course this is true, but the parties meet every two years around the bargaining table and adjustments can be made at this time. It is equally true, from time to time, the trustees of the benefit plan may be able to obtain *decreased* premiums for other benefits ie. group life insurance, long-term disability etc., and in these cases the employer would not receive a refund. "Run of the Mill" increases or decreases in premiums can be anticipated over the two year term of a collective agreement, and can easily be handled without a major impact on the reserves of the trust-fund.

8. However, the complete elimination, by law, of the trustees direct obligation to remit the total O.H.I.P. premiums, is a very different situation, and should be met by the appropriate equitable adjustment, as outlined in my proposal above, so that everyone comes out even and we have no winners and no losers.

0134-90-R The Ontario Secondary School Teachers' Federation, Applicant v. **The Hastings County Board of Education,** Respondent

Bargaining Unit - Certification - School Boards and Teachers Collective Negotiations Act - Union seeking a unit of occasional teachers only - School Board arguing unit should also include supply instructors - Board finding unit of occasional teachers only to be appropriate

BEFORE: *Robert Herman,* Vice-Chair, and Board Members *C. McDonald* and *M. Rozenberg.*

APPEARANCES: *Sherry Liang, Brian Babineau* and *Richard Commerford* for the applicant; *K. W. Kort, Shirley Warren* and *Fred Deacon* for the respondent.

DECISION OF THE BOARD; May 18, 1990

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act.*

3. The applicant seeks to be certified to represent employees in a bargaining unit it describes as follows:

> all occasional teachers employed by the respondent in its secondary panel in the County of Hastings, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*. For purposes of clarity "occasional teachers" has the meaning assigned to it by clause 1(1)(31) of the *Education Act*.

4. In its Reply, the respondent took the position that the appropriate bargaining unit should consist of all occasionals employed in both the elementary and secondary panels. The respondent also raised a concern about the sufficiency of notice to employees.

5. At the hearing the respondent sought to amend its position and request the following bargaining unit:

> all occasional teachers and supply instructors employed by the Hastings County Board of Education in its secondary panel in the County of Hastings save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*. For purposes of clarity the term "occasional teacher" has the meaning assigned to it by section 1(1)(31) of the *Education Act*, and the term "supply instructor" means persons referred to in section 22(1) of Ontario Regulation 262 as amended by Ontario Regulation 233/88.

There was no objection to the respondent's amendment and the Board granted the respondent's request. The parties further agreed that the notice to employees had been sufficient.

6. In the result, the applicant seeks a unit of occasional teachers only in the secondary panel of the Board of Education, while the Board of Education submits that the bargaining unit should include supply instructors as well. In recent years the Board has had to deal on numerous occasions with bargaining units involving occasional teachers. In *Carleton Roman Catholic Separate School Board* [1987] OLRB Rep. Jan. 18, the applicant sought a bargaining unit consisting solely of occasional teachers, and the respondent Board of Education asked that supply instructors be included in that bargaining unit, positions identical to those before us in this proceeding. That decision fully explains the meaning of these two types of instructors. After surveying the legislation and the Board's jurisprudence, the Board concluded that a bargaining unit of occasional teachers only was an appropriate bargaining unit.

7. In *The Muskoka Board of Education* [1989] OLRB Rep. July 775, the parties were agreed that the appropriate bargaining unit should consist of both occasional teachers and supply instructors. In finding such a unit to be appropriate, the Board wrote, in part, as follows:

> 10. There are a number of distinctions between the circumstances of these applications and those of the application dealt with in *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18. The reliance of the applicant during organizing on the Board's findings in previous cases was a significant factor in that decision. By contrast with the facts in that case, the facts before us show a considerable evolution of collective bargaining practice toward inclusion of supply instructors with occasional teachers in a single unit. The regulatory restriction on employment of anyone supply instructor for more than 10 days in a school year has been relaxed. The community of interest of occasional teachers is still different from that of supply instructors, but that does not mean that inclusion of both groups in one bargaining unit is inappropriate.

> 11. The Legislature still shows no inclination to include under one labour relations statute all those employed by school boards to "teach" or even all those "qualified teachers" so employed. Indeed, the latest amendments to the *Education Act* have excluded another category of qualified teacher from the ambit of the *School Boards and Teachers Collective Negotiations Act*. Because of the observations made in paragraph 7 of each of the earlier decisions in these applications, the applicant and respondents have considered whether those who "instruct" or "teach" otherwise than as substitutes for "regular" teachers and who fall under the *Labour Relations Act* for labour relations purposes should be included with occasional teachers and supply instructors in a single bargaining unit. They do not consider that desirable in either of these cases. If they are content, it does not seem inappropriate to us that occasional teachers should be in a different unit from those who do not function as substitutes for teachers.
>
> 12. It does not make sense to have supply instructors form a separate unit by themselves; in functional and practical terms it makes more sense to group them with occasional teachers than with a distinct unit of the other teachers and instructors who fall under the *Labour Relations Act*.

8. In a decision issued just prior to that decision, in *The Nipissing Board of Education* (unreported, Board File No. 0538-89-R, June 21, 1989), where the parties were also in agreement, the Board found that occasional teachers only was an appropriate bargaining unit.

9. The agreed upon facts indicate that the respondent Board of Education employs both occasional teachers and supply instructors. In October and February of each year, the Board of Education prepares a list of teachers within each of these two categories, and forwards the lists to all principals in both the elementary and secondary panels. The principals utilize these lists to obtain substitute teachers. There are also substitute teachers who work out private arrangements with a principal or school, and deal directly with and teach solely in a particular school. Their names are not found on either of the two lists. The work performed by the occasional teachers and supply instructors is indistinguishable. The differences between these two categories are few: the occasional teachers are "qualified" teachers within the meaning of the relevant legislation, whereas the supply instructors are not; when a supply instructor is appointed to teach, the specific appointment is valid only for ten school days; the occasional teachers, presumably because they are "qualified", receive a higher amount of pay than the supply instructors. Other than these differences the terms and conditions of employment are identical between the two categories. In neither category are benefits received or seniority accumulated, and teachers in both are paid on a per diem basis.

10. The respondent argues that the pattern of bargaining in the educational sector with respect to occasional teachers and supply instructors has significantly developed since the Board's decision in *Carleton Roman Catholic Separate School Board* (*supra*). Although the Board found in that case that a bargaining unit consisting solely of occasional teachers was appropriate, the respondent submits that since that time parties in the educational sector have generally agreed to include both groups of substitute teachers in one bargaining unit, thereby recognizing that such a unit is more appropriate. This pattern serves as a strong indication, the respondent submits, that the appropriate bargaining unit now consists of both occasional teachers and supply instructors. The respondent submits that Board's decision in *The Muskoka Board of Education* (*supra*), reflects this new reality, and also serves as notice to unions organizing in the educational field that the Board will henceforth consider the appropriate bargaining unit for substitute instructors to include both occasionals and supply instructors. The respondent argues that the applicant cannot therefore argue that it relied upon the policies and practice of the Board in conducting its organizing campaign. The respondent further asserts that a bargaining unit consisting of occasional teachers only would not be appropriate, because it would cause undue and inappropriate fragmentation. It would create a structure with (at least) two bargaining units where employees within each perform virtually the same jobs with no meaningful distinctions in their terms and conditions of employment.

11. The applicant submits that the Board has routinely found a bargaining unit consisting solely of occasional teachers to be appropriate. The applicant relied upon that fact in its organizing campaign and submits that the decision of the Board in *The Muskoka Board of Education* did not indicate a prospective change in the Board's position. Most importantly, whether or not a bargaining unit consisting of both categories of instructors would be appropriate, the applicant submits that a bargaining unit consisting solely of occasional teachers remains an appropriate bargaining unit, a unit which would not cause any serious labour relations problems for the employer.

12. At the conclusion of submissions, the Board gave an oral decision with reasons. The Board must decide whether the bargaining unit sought by the applicant is appropriate in all the circumstances, and not whether the bargaining unit sought by the respondent is more sensible. The Board does not read the decision in *The Muskoka Board of Education* as putting the community on notice that henceforth a bargaining unit consisting of occasional teachers only would no longer be found to be appropriate by the Board. In that decision the Board concluded, on the facts before it and in light of the parties' agreement, that a bargaining unit consisting of both occasional teachers and supply instructors formed a rational and sensible bargaining unit. It did not conclude that a bargaining unit of occasional teachers only would not have been an appropriate unit. Although it found the composite unit to be appropriate, the Board recognized the different community of interest existing between the "qualified" and "unqualified" teachers. At the end of paragraph 10 of that decision, the Board wrote:

> The community of interest of occasional teachers is still different from that of supply instructors, but that does not mean that inclusion of both groups in one bargaining unit is inappropriate.

13. In the circumstances before us the Board is satisfied that a bargaining unit consisting solely of occasional teachers is an appropriate bargaining unit. This is a bargaining unit that has been found to be appropriate for many years by the Board. A history exists during which Boards of Education would have encountered any serious labour relations problems caused by such a unit. There is no evidence of any such problems before us. No doubt various Boards of Education and unions have agreed to voluntarily include supply instructors in a bargaining unit after the union has only been certified to represent occasional teachers. However, this fact alone does not suggest that serious labour relations problems would exist for a bargaining unit consisting solely of occasional teachers. Although fragmentation in the work place is and remains a concern, it must be assessed in the context of the educational field which is by legislation significantly fragmented, and in which the parties have for years conducted labour relations under the confines of this fragmented bargaining structure. In all these circumstances, we conclude that a bargaining unit of occasional teachers only is appropriate.

14. The Board therefore finds that all occasional teachers employed by the respondent in its secondary panel in the County of Hastings, save and except the persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*, constitutes a unit of employees of the respondent appropriate for collective bargaining. For the purposes of clarity, the term "occasional teacher" has the meaning assigned to it by section 1(1)(31) of the *Education Act*.

15. On agreement, the parties adjourned the proceeding until May 25, 1990.

16. This matter is referred to the Registrar.

2229-89-FC United Food and Commercial Workers International Union, Local 1000A, Applicant v. **Hillview Farms Limited,** Respondent

Collective Agreement - First Contract Arbitration - Interest Arbitration - Employer in business of preparing and packaging soils and fertilizers - Board determining wage schedule in first collective agreement - Employer's proposal for a two-tier wage structure inappropriate

BEFORE: *M. A. Nairn,* Vice-Chair, and Board Members *M. Rozenberg* and *D. A. Patterson.*

APPEARANCES: Roman E. Stoykewych and *Kevin Corporan* for the applicant; *William McNaughton* and *R. Pascoe* for the respondent.

DECISION OF THE BOARD; May 10, 1990

I

1. Having regard to the parties' agreement, the panel directs, pursuant to section 40a of the *Labour Relations Act* (the "Act") that the first collective agreement between them be arbitrated. The parties referred the matter to the Board for arbitration. The parties further agreed to waive all applicable time limits contained in section 40a.

2. The parties were able to agree to a considerable number of matters to be contained in their collective agreement. In dealing with the remaining issues in dispute the panel received both *viva voce* evidence and documentary material from the parties and heard their submissions.

3. The collective agreement is to be comprised of our award on those issues in dispute and those items the parties have agreed to. Those agreed to items were filed as Schedule A in Tab 1 of the applicant's brief and were amended or added to by agreement of the parties prior to the completion of the hearing as follows.

4. The parties amended Article 16.01 to read as follows:

> 16.01 After an employee has completed his probationary period, the Company agrees to pay the premium for benefits as set out in Schedule B.

Schedule B was provided to the panel and it is agreed by the parties that it forms part of the collective agreement.

5. Letter of Understanding No. 4 is agreed to between the parties.

6. The parties provided to the panel their agreement that the collective agreement shall terminate nineteen months from the date of our award. Having regard to that agreement, Article 26.01 of the Collective Agreement shall read:

> 26.01 The terms of this Agreement shall be binding upon the parties hereto from May 10, 1990 through December 9, 1991 and thereafter from year to year unless either party gives to the other party written notice for renewal, cancellation or modification. Such notice must be given not earlier than ninety (90) days and not later than thirty (30) days prior to the expiration of this Agreement.

7. Also agreed to by the parties in the course of the hearing was paragraph 5.0 of Schedule A which reads as follows:

> 5.0 Heavy Machinery supervisor, when appointed - 25¢/hr. premium over the applicable heavy machinery rate.

II

8. The panel has reviewed and considered the material contained in the parties' briefs, the evidence taken at the hearing, and the parties' submissions. In the interest of expediting the release of this award, we do not intend to set out the background of this dispute except as it may be instructive of our award for these parties. The following quote from *Egan Visual Inc.*, OLRB Rep. Dec. 1687 summarizes our approach:

> 3. ... The Board would, however, adopt the language set forth in *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Oct. 1327. In that case the Board indicated that it had adopted a somewhat similar approach to the reasoning of the British Columbia Labour Relations Board in *London Drugs Ltd.*, [1974] Can. LRBR 140 at page 147. The Board agrees that applications under section 40a of the Act with respect to a first contract arbitration by the Board should not be used to achieve major breakthroughs in collective bargaining, but rather, the Board would try to settle the terms of a collective agreement which reflect a fairly general consensus as to what should be the contents of a collective agreement having regard to the particular circumstances of each collective bargaining situation. The Board also agrees that the terms of the collective agreement should be sufficiently attractive to the employees who are in the bargaining unit defined in the collective agreement that they would give serious consideration before deciding to terminate the bargaining rights of the applicant.

9. The employer is in the business of preparing and packaging soils and organic fertilizers and screening and packaging decorative aggregates. The company sells its products to garden centres, department stores, hardware chains, etc. which retail to the home and industrial horticultural market. The Union was certified to represent a bargaining unit of employees of the employer on March 3, 1989.

III

10. The articles in dispute are as follows:

- Article 12.07 (c), (e), and (g)

- Article 17.03 - the issue is the amount of shift premium payable

- Schedule A - Wages - paragraphs 1, 2, 3, 4.

Article 12.07

11. This Article falls under the more general heading of "Article 12 - Seniority" in the collective agreement. Article 12.07 sets out those various circumstances which will result in the termination of both the seniority and the employment of an employee. The parties are agreed with respect to certain of those circumstances set out as Article 12.07 (a), (b), (d), and (f). They remain in dispute with respect to Article 12.07 (c), (e), and (g).

12. Article 12.07 (c) deals with the loss of seniority and employment when an employee is not on the active payroll of the company for a period of time. The parties are in dispute simply with respect to the appropriate time frame. In Article 12.06 the parties appear to have turned their minds to the term "active payroll" and contemplate circumstances of lay-off, sickness or accident. In that clause, the parties are agreed that in such circumstances an employee's seniority will continue to accumulate for a period of time equal to his length of service to a maximum of six months. Article 12.07 (c) will provide an employee with an opportunity to return to employment although

absent from the work place due to lay-off, sickness or accident. The parties are agreed that in this round of negotiations they do not wish to provide recall rights to persons who are employed during the peak period and who would normally be considered seasonal employees. The season is generally five months long. The parties have also agreed in the language of Article 12.07 (c) that the employee's length of seniority, if less than the time-frame in dispute, will be the determining time-frame. We note that the parties have not agreed to any short term sick leave plan or a long term disability plan. However, Schedule B to the collective agreement does provide that if an employee becomes totally disabled so as to be unable to engage in any gainful work for, *inter alia* six months, life insurance will continue without cost to the employee in certain circumstances. Schedule B also provides that all insurance ceases on termination of employment.

13. Therefore, given that this clause creates recall rights and the context provided by Article 12.06 and Schedule B we determine that paragraph (c) of Article 12.07 shall read:

> (c) is off the active payroll for a continuous period of nine months or length of seniority, whichever is the lesser;

14. Articles 12.07(c) and (g) each raise the same issue. They define different circumstances wherein an employee is required to provide the employer with a valid reason for their absence. The company has stated that it recognizes that any determination it makes as to whether a reason was "valid" or not would be subject to review by an arbitrator. It asks that the words "acceptable to the employer" be included. The resulting language would in our view be ambiguous. In addition, a likely interpretation of those words would be to provide an employer with a broader discretion in determining whether a reason was valid and substantially insulate its decision from arbitral review. The employer both acknowledges and accepts the potential for a grievance concerning the "validity" of the reason for absence. Given that the effect of applying these paragraphs is the loss of both seniority and employment, the parties are both better served by having their intention stipulated clearly.

15. Therefore paragraphs (e) and (g) of Article 12.07 shall read:

> (e) fails to return to work upon the termination of an authorized leave of absence unless a valid reason is given;
>
> (g) is absent from work for two (2) working days or more without providing a valid reason.

Article 17.03

16. The only dispute in Article 17.03 is the amount of premium payable for work performed on the night or afternoon shift. This is a cost issue. The employer is proposing no increase to the current amount of 25 cents per hour. The union is seeking an increase to 35 cents per hour. Having regard to our award with respect to Schedule A we award a premium of 30 cents per hour. For purposes of clarity, this increase is to take effect the date of this award.

Schedule A

17. Schedule A is the wage schedule. There are a number of issues in dispute, including the employer's proposal for a two-tier wage structure, the hourly rates payable, the premium to be paid to the lead hand classification, the premium to be paid to the foreman classification, and retroactivity.

18. The company's wage proposal provides rates for individuals currently employed and

lower rates for employees hired after the date of this award. It is the employer's position that such a wage structure would allow the company to hire for peak periods at less expensive rates without reducing the wages of current full time employees. The employer indicated that it meets its seasonal demand with part-time employees and students. Those individuals are not covered by this award as they are excluded from the bargaining unit. To the extent that there may be some cost saving with respect to full-time employees within the bargaining unit, any savings in our view would not outweigh the disadvantages of such a system. Although it may be appropriate to initiate cost saving measures by limiting wage increases, those should, in our view, be shared by all members in the bargaining unit. Introducing this type of pay structure results in two employees performing exactly the same work but receiving different wage rates based solely on an arbitrary date of hire. This is distinguishable from the application of a principle of seniority. It is also inappropriate in our view in the context of section 40a of the Act to award a two-tier wage structure which may appear to penalize those employees hired following the arrival of the union in the work place. Therefore we have not awarded a second level to the wage scale.

19. In response to the employer's proposal for a two-tier wage scale the union proposed the introduction of a probationary wage rate. Both proposals were addressed to three (although not the same three) of the six job classifications. In a decision dated April 24, 1990 we advised the parties that we would not adopt a two-tier structure and sought their further submissions with respect to the implementation of a probationary wage rate for all classifications. The parties have agreed to a probationary period in Article 12.02. We were not told whether this was a pre-existing term of employment. However we are of the view that it would not be appropriate to implement a probationary wage rate for only certain job classifications. Therefore we have awarded a probationary wage grid in paragraph 2.0 of Schedule A. We note that Article 12.02 establishes a probationary period of 45 days actually worked during any twelve consecutive months. Our award at paragraph 2.0 of Schedule A is intended to adopt that time frame noting that it is in reference to days worked from date of hire.

20. Although we have some evidence with respect to the job functions in the various classifications, we have no evidence with respect to the basis for the particular differentials in wages. In assessing appropriate hourly rates, we note that with the exception of the heavy machinery/truck classification the last wage increase received by these employees was in mid-1987. The parties are agreed that there are no directly relevant comparisons of either unionized or non-unionized employers. The union did provide us with evidence of two collective agreements in the vicinity of the employer where the packaging and distribution functions may be similar. The union also provided us with statistical information of Ontario average wage rates in the manufacturing sector. We note that the average hourly rates referred to by the union include overtime. Therefore the actual hourly rates would be lower than they appear for a forty-hour work week. We note as well that the union's wage request is still somewhat lower than the average hourly rates in those manufacturing areas most comparable to this employer. The union does however acknowledge that the employer is in some financial difficulty.

21. We heard evidence from Mr. A. Pascoe, the Vice-President of Hillview Farms and received recent financial statements for the company. It is operating at a loss. However, the evidence with respect to the employer's inability to pay is less than conclusive. The company was sold in March 1988 to Nu-Gro Corporation, a holding company of which Mr. Pascoe is President. At the time of purchase Hillview Farms had been losing money for some years and Mr. Pascoe acknowledged that it is an ongoing feature of the company to operate at a loss. The witness stated that the company was unable to increase the price of its products in order to remain competitive yet agreed that in the area that it services, there are no direct competitors. Evidence of a decline in price for products over the last five years was with respect to their retail price, not the wholesale

market. Mr. Pascoe agreed with union counsel that even if a wage increase of twenty percent were awarded in the first year of this collective agreement, it would represent less than a one percent increase in the total cost of production. This is not a labour intensive operation. He also agreed that in setting budgets and pricing he operates with a margin of some three to four percent. Mr. Pascoe expects the company to operate at a loss this year but testified that he has forecast less of a loss than in previous years.

22. We have not placed any weight on the comparisons provided by the employer with respect to the two non-unionized companies in which Nu-Gro Corporation has either an interest or a relationship. Apart from the evidence referred to as to the effect of the union's proposal on costs, we were not provided with evidence of the number of hours annually worked by employees in the various classifications in order to accurately calculate the impact on total production costs. In determining the wage schedule in this case, we have taken into account the employer's fiscal year, its concerns regarding retroactivity, the union's acknowledgement that the employer is in financial difficulty, the fact that there has been (with limited exception) no wage increase since mid-1987, the seasonal nature of at least some of the workforce, the nature of the work performed, the expiry date of the collective agreement, and the fact that this first collective agreement is being arbitrated pursuant to section 40a of the Act. We have also reviewed the Consumer Price Index for Ontario for the period in question.

Premium for lead hand and foreman classifications

23. The company is proposing a forty-five cent per hour premium for lead hands and a seventy cent per hour premium for foremen. These appear to be the current rates. The union is proposing a premium of $1.25 for both classifications. Individuals in these classifications are permanently assigned.

24. We asked the parties to provide us with evidence as to how these individuals were scheduled and the nature of the work they performed. It would appear that historically a differential in the premium has been recognized. On afternoon or night shifts the employer seems to acknowledge a higher degree of responsibility resting on the bargaining unit employee who would supervise a line but also have certain overall responsibility in the absence of management employees. The employer compares this to employees on the day shift who supervise a line but who have no other responsibility in that managerial employees are present. However, the exercise of these responsibilities does not appear to be consistent with the job title. The evidence established that it is the foremen who have been working on the day shift and Mr. Pascoe testified that on that shift they would perform the same work as the lead hand. He also agreed that he would "not be surprised" if it were the lead hands who were performing the "foreman" role on the afternoon shift. It appears that the employer is about to introduce a night shift as well.

25. Consequently, the individuals in these two classifications by performing the same work are entitled to receive the same pay. The question of whether certain individuals are entitled to a higher premium by virtue of a greater responsibility on the afternoon or night shift is a different question in the circumstances of this work place at the present time. It may be that the parties, having entered into a collective bargaining relationship, will review the operation of the work place and see fit to clarify that issue. To that extent, our award does not address the question of an appropriate level of compensation for individuals exercising greater or different responsibility by virtue of working on an afternoon or night shift.

26. We have awarded a retroactive increase to wages to the extent set out in the wage schedule following.

27. Therefore having regard to the above we make the following award with respect to Schedule A:

1.0		*Hourly Wage Rate for Regular Employees Effective:*			
		Dec. 1–89	*May 10–90*	*Dec. 1–90*	*May 1–91*
(a)	Line Work	8.95	9.25	9.55	9.75
(b)	Light Machinery	9.20	9.50	9.80	10.00
(c)	Automatic Machine Operator	9.65	9.95	10.25	10.45
(d)	Warehouseman	9.65	9.95	10.25	10.45
(e)	Heavy Machinery, Highway Truck Driver	10.55	10.85	11.15	11.35
(f)	Maintenance	10.90	11.20	11.50	11.70

2.0		*Hourly Wage Rate for Probationary Employees Effective:*		
		May 10–90	*Dec. 1–90*	*May 1–91*
(a)	Line Work	7.50	7.80	8.00
(b)	Light Machinery	8.50	8.80	9.00
(c)	Automatic Machine Operator	8.95	9.25	9.45
(d)	Warehouseman	8.95	9.25	9.45
(e)	Heavy Machinery, Highway Truck Driver	9.85	10.15	10.35
(f)	Maintenance	10.20	10.50	10.70

3.0 Lead hands, when appointed - 75¢/hr. premium over line worker rate.

4.0 Foremen, when appointed - 75¢/hr. premium of line worker rate.

28. The retroactive amount in paragraph 1.0 of Schedule A is to be calculated based on hours paid and is payable to employees who were employed on or since December 1, 1989 and who are employed on the date of this award.

29. Should there be any employee who has been hired at a rate higher than that provided for in paragraph 2.0 of Schedule A and who has not yet worked their first 45 days in accordance with Article 12.02 they are to be red-circled at their current rate until they have actually worked their first 45 days, at which time they are to be paid in accordance with paragraph 1.0 of Schedule A.

30. We direct that the collective agreement contain the items agreed to as referred to earlier and our award with respect to the items in dispute. Should the parties have any dispute with respect to the preparation of the actual document we will remain seized in order to ensure that the collective agreement is prepared by the parties forthwith. The collective agreement takes effect from the date of our award (subject to the retroactive order made with respect to wages).

31. It was apparent to the panel that during the course of dealing with this application the parties were able to identify and review various issues in the work place relevant to their collective bargaining relationship. Some factors may well remain to be considered in greater depth. We encourage the parties to build those avenues of communication and to develop their relationship in anticipation of their negotiations for the renewal of their first collective agreement.

1477-89-G Labourers' International Union of North America, Local 1036, Applicant v. **Jaddco E. Anderson Ltd.,** Respondent

Construction Industry - Construction Industry Grievance - Parties - Whether employers' organizations which are constituents of an employer bargaining agency are parties to construction industry referrals - No right to standing under Act - Board also rejecting right to party standing based on argument that their legal rights are affected by issue to be arbitrated - Issue is whether general contractors are bound to trade appendices to the collective agreement or only to local union schedules - No legal right to participate found in collective agreement - No special circumstances leading Board to exercise its discretion to give employers' organizations standing - Union local not entitled to standing - Union's interest akin to that of a commercial interest - Merits of grievance to be set down for hearing

BEFORE: *N. B. Satterfield,* Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn.*

APPEARANCES: *L. A. Richmond, B. Suppa* and *R. Weiss for the applicant; David L. Brisbin* and *Brian Timmins* for the respondent; *Bruce W. Binning* for the Labour Relations Bureau of the Ontario General Contractors Association; *Jack J. Slaughter* and *Ken Lew* for International Union of Operating Engineers, Local 793; *Richard J. Charney* for the Ontario Masonry Contractors Association.

DECISION OF THE BOARD; May 7, 1990

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

2. The grievance arises under the provincial collective agreement effective May 1, 1988 to April 30, 1990 (hereafter "the Agreement") between the designated employer and employee bargaining agencies for labourers who are respectively:

> Labour Relations Bureau of the Ontario General Contractors Association: Ontario Masonry Contractors Association: Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Concrete Floor Contractors Association of Ontario; (hereinafter called the "Employer Bargaining Agency" or "E.B.A.")
>
> - and -
>
> The Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089; (hereinafter called the "Union")

The Agreement is a provincial agreement within the meaning of clause (e) of subsection 137(1) of the Act. Accordingly, the Board served notices of this application on the designated employee and employer bargaining agencies who are the parties to the Agreement. Neither of them was present or represented at the hearing.

3. When the application came on for hearing before the Board, three other parties were seeking standing in the proceedings. These were the International Union of Operating Engineers, Local 793 which had filed an intervention in the application, the Ontario Masonry Contractors Association and the Labour Relations Bureau of the Ontario General Contractors Association (hereafter "the OMCA" and the "OGCA"). The OMCA and the OGCA are two of the five

employers associations which form the designated employer bargaining agency. The Board heard the full representations of counsel for all parties on the standing issue and reserved its decision.

4. In order to be a party as of right to an application under section 124 of the Act, a person must be specified as a party by or under the Act, or be entitled by law to be a party. Section 124 itself provides that a grievance may be referred under it by "...a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions...". Subsection 147(3) further provides that:

> [a]ny employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 124.

Finally, subsection 147(2) makes a provincial agreement binding upon:

> (1) the employer bargaining agency;
>
> (2) the employers represented by the employer bargaining agency;
>
> (3) the employee bargaining agency;
>
> (4) the affiliated bargaining agents represented by the employee bargaining agency; and
>
> (5) the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) of the Act.

When section 124 is read together with subsections 147(2) and (3), it is clear that the applicant Labourers' International Union of North America, Local 1036 and the employer Jaddco E. Anderson Ltd. whom the applicant made respondent to the application are parties as of right, as the two bargaining agencies would be if they had sought to intervene. Local 793 does not rest its claim for standing on any right under the Act; the OMCA and the OGCA do.

5. Counsel for the applicant and for the OMCA argue that section 124 and subsections 147(2) and (3) make the two designated bargaining agencies parties to those proceedings, but do not confer a similar right on an individual employers' organization where it is one of two or more employers' organizations comprising an employer bargaining agency. Counsel for the OGCA argues that the definition of employer bargaining agency in clause (d) of subsection 137(1), which includes "a group of employers' organizations", clearly contemplates the possibility of an employer bargaining agency being comprised of more than one employers' organization. Counsel argues further that, to interpret subsection 147(3) of the Act, which makes "[a]ny employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement..." a party to a section 124 referral, to not include a constituent employers' organization of an employer bargaining agency when the subsection includes individual affiliated bargaining agents, is to say each employers' organization constituting an employer bargaining agency of two or more employers' organizations must speak with one voice. That, counsel asserts, makes no more sense than saying affiliated bargaining agents of an employee bargaining agency, each of which is considered a party for purposes of section 124, must speak with one voice. Therefore, counsel argues, subsection 147(3) should be interpreted to consider employers' organizations which are constituents of an employer bargaining agency to be parties to section 124 referrals.

6. There is no doubt that clause (d) of subsection 137(1) contemplates the possibility of an employer bargaining agency being made up of two or more employers' organizations. The definition of an employer bargaining agency was already part of the province-wide bargaining provisions

of the Act when subsection 147(3) was added to the Act in 1980. It must be presumed that the Legislature was aware of that definition when it amended the Act to include subsection 147(3). Therefore, when the Legislature provided in the subsection that affiliated bargaining agents and employers bound to a provincial agreement were to be considered parties for purposes of section 124, but did not specify that a constituent employers' organization of an employer bargaining agency was to be considered a party, it is to be presumed that the Legislature decided that such employers' organizations ought not to have standing for purposes of section 124. Therefore, in the Board's view, neither the OMCA nor the OGCA are to be considered a party for purposes of section 124 within the meaning of that section and subsections 147(2) and (3) of the Act.

7. That does not end the standing issue for the OMCA and the OGCA, however. Both claim that they are entitled to participate as of right in these proceedings because their direct, legal rights are affected by the issue to be arbitrated.

8. Counsel for the OMCA claims that, even though the OMCA was seeking standing only because the OGCA was attempting to intervene in the referral, the OMCA is entitled as of right to participate. This is because clause 1.02 of the Trade Appendix for Masonry Tenders ("the Appendix") of the Agreement gives the OMCA the sole and exclusive function to administer the Appendix, "...including the processing of all grievances and finalization thereof in accordance with the Master Portion of this Agreement.".

9. The claim of the OGCA that it is entitled as of right to participate in the proceedings relates to its role as bargaining agent for general contractors bound to the Agreement for purposes of conducting bargaining respecting certain terms and conditions of the Agreement. In this regard, the structure of the Agreement is relevant to an understanding of the OGCA's position. There are three divisions to the Agreement: the Master Portion, the trade appendices and the local union schedules. The Master Portion sets out the general conditions of the Agreement affecting all parties who are bound to it. The trade appendices set out the detailed terms and conditions of employment, such as hours of work, wage rates, vacation pay, contributions to welfare and pension funds and payment of union dues for employees of specialty contractors bound to the Agreement. There are three trade appendices, one each for mason tenders, cement finishers and waterproofing. The local union schedules include similar kinds of terms and conditions of employment to the trade appendices. Generally speaking, there is a local union schedule for the geographic jurisdiction of each local union which is an affiliated bargaining agent of the designated employee bargaining agency and they are said to govern the terms and conditions of employment for employees of general contractors bound to the Agreement.

10. The two bargaining agencies negotiate the Master Portion of the Agreement. The employer bargaining agency does not negotiate the specific terms and conditions of employment which go into various appendices and schedules. The trade appendices are negotiated between the designated employee bargaining agency and the constituent employers' organizations of the employer bargaining agency. Thus the employee bargaining agency negotiates the Appendix with the OMCA, the cement finishers appendix with the Concrete Floor Contractors Association of Ontario and the waterproofing appendix with the Waterproofing Contractors Association of Ontario. On the other hand, the local union schedules are negotiated between the Labour Relations Bureau of the OGCA and the Industrial Contractors Association of Canada ("the ICA"), representing employers, and the various affiliated local unions of the employee bargaining agency. The employer bargaining agency has no right of veto over what its constituents negotiate for these appendices and schedules which are incorporated into and made an integral part of the provincial collective agreement. The constitution of the employer bargaining agency gives the OMCA and

the OGCA (together with the ICA) the exclusive authority to negotiate the terms and conditions of the Appendix and the local union schedules, respectively.

11. The referred grievance alleges that the respondent has failed to pay the proper wages and benefits prescribed by clause 4.04 of the Appendix. The respondent's defence to the grievance is that it is not bound by the Appendix, rather, on the job in question, it was bound by the Local Union Schedule for Local 1036 - Sault Ste. Marie ("the Schedule"). Counsel for the respondent and counsel for the OGCA state that general contractors like the respondent are bound by the local union schedules when they work within the geographic jurisdiction of a particular local and are not bound by the specialty appendices. The applicant and the OMCA appear to take the position that the respondent is a contractor to which the Appendix applies when the respondent performs the kind of work which was involved in the project on which the grievance arose. The respondent and the OGCA point out that the respondent can only be in breach of clause 4.04 of the Appendix if the Board first finds that it is bound by the Appendix when it performs the work at issue in the grievance. Therefore, the grievance turns on that issue. They point out further that, if the Board were to find that the respondent is bound to the Appendix when it performs this kind of work, some of the terms and conditions on which the applicant relies appear to conflict with the respondent's obligations under the provincial agreement binding on it and Local 793. Counsel for the OGCA argues that for the Board to interpret and apply the Appendix in the manner asserted by the applicant would be contrary to the very structure of the Agreement and would expose other general contractors to the risk of being found to be bound to the Appendix in similar circumstances. Such results would be to say that the OMCA, could act, exclusive of the OGCA, to negotiate terms and conditions for the Appendix which would have the affect of binding general contractors to the Appendix contrary to their interests and to the OGCA's exclusive jurisdiction under the constitution of the employer bargaining agency to negotiate terms and conditions of work for them in the local union schedules.

12. If, on those grounds, the OGCA would be entitled as of right, to participate in these proceedings, so would the OMCA. Their exclusive jurisdiction to negotiate with the employee bargaining agency, in the case of the Appendix, and with its affiliated bargaining agents in the case of the local union schedules, comes from the constitution of the employer bargaining agency, not from the Agreement. An interpretation of the Agreement, therefore, cannot affect their bargaining jurisdiction. In the Board's opinion, the assertion that the grievance raises a conflict about which of two different sets of conditions should apply to the construction labourers performing the work at issue, or that its claim strikes at the structure of the Agreement does not entitle either of the two organizations to be a party to the application. The employer bargaining agency which is the "employer" party to the Agreement, was given notice of the application, is entitled to participate and could have appeared to defend the structure of the Agreement. For whatever reason it chose not to and has not delegated either the OMCA or the OGCA to act for it. Therefore, in the Board's view, the grounds advanced by the OGCA do not establish an entitlement independent of the employer bargaining agency of which it is a part to be a party to these proceedings. To the extent that those same grounds could apply to the OMCA, the result is the same as for the OGCA.

13. Nor does the Board consider the authority given to the OMCA by clause 1.02 of the Appendix to entitle it as of right to participate in the proceedings. The Appendix does not stand alone as a collective agreement. By its very wording it forms an "integral part..." of the Agreement. In any event, by operation of subsection 146(2) of the Act, which prohibits any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents than a provincial agreement, it would be null and void. Whatever rights the OMCA may have under the Appendix and Article 14 of the Master Portion of the Agreement for the processing of grievances under the provisions of the Agreement, the applicant has chosen to take the grievance

to arbitration outside of the Agreement by bringing this referral. No one has argued that the applicant does not have the authority to do that. The Board has already found that the OMCA does not have standing as of right under the Act. The Board sees nothing in Article 14 - Grievance and Arbitration Procedure of the Master Portion of the Agreement, the Appendix or any other part of the Agreement which establishes any direct, legal right of the OMCA which would entitle it by law within the meaning of section 5 of the *Statutory Powers Procedure Act* to be a party to the proceedings.

14. When the Board sits as an arbitrator under section 124 of the Act, it has all of the powers of an arbitrator under the Act as well as those provisions of the Act which govern the conduct of the Board's affairs and its normal practice. See Re: *International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al* (1979), 25 O.R. (2d) 8. Those powers include the discretion to add parties to proceedings under section 124 of the Act even though they may not have a direct legal interest in the proceedings. It is, however, a power which the Board has said should be exercised sparingly so as not to undermine the speed and economy which section 124 was designed to achieve. *Williams Contracting Ltd.*, [1980] OLRB Rep. Jan. 121. The Board's discretion comes from its jurisdiction under subsection 102(13) of the Act to:

> "...determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable."

and from section 79 of the Board's Rules of Procedure which provides that:

> [t]he Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

The Board in *Ontario Hydro*, [1986] OLRB Rep. May 663, at paragraph 26, commented as follows on the Board's exercise of the discretion to add parties in section 124 proceedings:

> Having regard to the nature of the grievance arbitration process, when sitting as an arbitration board under section 124 of the *Labour Relations Act* this Board should not permit intervention by persons who are not entitled to standing as of right except when the special circumstances of the proposed intervener make it desirable from a labour relations perspective to permit such intervention. No such circumstances were demonstrated here....

The party seeking to intervene in that case was a contractor supplying equipment to Ontario Hydro. While the OMCA and the OGCA stand in a different relationship to the parties to these proceedings than the would-be intervener in *Ontario Hydro*, the principle still applies. There is nothing which they can contribute as interveners which would "...make it desirable from a labour relations perspective to permit such intervention.", which could not be achieved by the participation of the employer bargaining agency, or by the respondent or the applicant involving any of the OMCA, the OGCA, or Local 793, for purposes of calling evidence or as a source of advice in the conduct of their respective cases. Thus, whatever knowledge the OMCA and the OGCA have respecting the structure and operation of the Agreement, its appendices and schedules relevant to the issues raised by the grievance can be made available to the Board without multiplying the parties to the proceedings. In these circumstances the Board sees no special circumstances which would make it desirable from a labour relations perspective to exercise its discretion to give them standing.

15. Local 793's interest in these proceedings relates primarily to what its counsel describes

as a potential conflict in the respondent's obligations under the provincial agreement to which they are bound and the respondent's obligation which would flow from a conclusion that the respondent was bound to the Appendix in the Agreement. The alleged conflict is because of certain job classifications common to the two documents. Apart from any other problems which such conflicts might create, the conflict does have overtones of a potential work jurisdiction dispute. If that is the case, section 91 of the Act is available to deal with that kind of dispute. In any event, having reviewed and considered the submissions of counsel for Local 793, the Board is satisfied that its interest is more analogous to a commercial interest in the ultimate decision. This panel of the Board agrees with the Board's observation in *Williams Contracting*, *supra*, that the Board should not "...readily exercise its discretion to add [parties] simply because they may have a commercial interest in the outcome of the proceeding.". Therefore, the Board will not exercise its discretion to make the International Union of Operating Engineers, Local 793 a party to these proceedings.

16. In the result, for all of the above reasons, the Board dismisses the requests for standing of the Ontario Masonry Contractors Association, the Labour Relations Bureau of the Ontario General Contractors Association and the International Union of Operating Engineers, Local 793. The Board confirms that the parties to this application are Labourers' International Union of North America, Local 1036 and Jaddco E. Anderson Ltd.

17. The Registrar is directed to list this application for continuation of hearing on the earliest available date. In the view of this panel, it is not seized with these proceedings. However, if the panel is available on a date that would be reasonable in all of the circumstances, it would be preferable if the matter could be scheduled before it.

1504-89-U Dennis Leonard, Complainant v. Ontario Nurses' Association, Respondent v. Mount Sinai Hospital, Intervener

Duty of Fair Representation - Settlement - Unfair Labour Practice - Complainant registered nurse terminated after he refused to submit to a psychiatric examination - Arbitration of complainant's grievance scheduled but settlement reached beforehand - Complainant signing settlement - Complainant arguing before Board that he was under improper pressure to accept settlement and its terms were unfair - Fair representation complaint against union dismissed

BEFORE: *R. O. MacDowell,* Alternate Chair, and Board Members *W. A. Correll* and *K. Davies.*

APPEARANCES: *Dennis Leonard* on his own behalf; *David Nicholson, Dottye Edwards, Marie McLean, Judy McIlwain* and *Bill Alexander* for the respondent; *Nancy Eber, Beverly J. Lanigan-Gilmour* and *Susan A. Lewis* for the intervener.

DECISION OF THE BOARD; May 15, 1990

I

1. This is the complaint of Dennis Leonard who contends that he has been dealt with by the respondent union ("ONA") contrary to sections 68 and 70 of the *Labour Relations Act*. Those sections read as follows:

> 68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
>
> 70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

2. A hearing in this matter was held in Toronto on November 6, 1989. ONA and the intervener, Mount Sinai Hospital, were both represented by counsel. The complainant appeared on his own behalf.

3. The union's Reply was not received by the Board until the business day immediately preceding the hearing date. That Reply contained various submissions, including the plea that even if the complainant's factual allegations were true, they would not support the relief requested (see *infra*). The union relied upon Rule 71 which provides as follows:

> 71.-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.
>
> (2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision.
>
> (3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.
>
> (4) Upon a request for review being filed, the Board may,
>
> (a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;
>
> (b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or
>
> (c) confirm its decision dismissing the application or complaint.

The union urged the Board to review each individual allegation, and conclude that none of them would establish a breach of sections 68 or 70 of the Act. The union submitted that the complaint should be dismissed in its entirety.

4. Given the late filing and the union's preliminary motion, the Board considered it appropriate to explore with the parties what facts were really in dispute. If the basic facts were not in contention it would not be necessary to formally prove them, and if particular assertions (although admitted) were not legally relevant it would be possible to limit the evidence. Accordingly, the Board went through the complainant's assertions, paragraph by paragraph, to clarify what the union did or did not agree with. The complainant was also given the opportunity to expand upon his pleadings, - bearing in mind that the validity of his grievance against the hospital is not directly in issue before us. The concern in this forum is the conduct of the respondent union.

II

5. The complainant is a registered nurse. At the time of his termination he had been

employed by the hospital for a little less than a year. He worked with infants in the intensive care/neo-natal unit. This is a position of trust and responsibility.

6. The complainant's initial quarrel with the hospital arose from a scheduling and wage payment dispute. The complainant asserts that he was induced to work a particular shift as a result of "lies" by a fellow employee. He maintains that the head nurse was aware of the situation and condoned the lie. The complainant contends that he should have been given an overtime shift. The complainant demanded compensation.

7. The hospital was not sympathetic to the complainant's position and, according to Mr. Leonard, did not take his complaint seriously. The hospital told him that the "problem" was simply a clerical error, and that the issue could have been cleared up in consultation with the personnel department.

8. That explanation was not acceptable to the complainant. In his words he "rejected it out of hand". He took the position (repeated before this Board) that he had been lied to, and that money had been stolen from him. He charged that records had been falsified, and that there had been a breach of both the *Employment Standards Act* and the *Criminal Code of Canada*. He told the hospital that because of the "manifest acts of corruption" by his fellow employees and the head nurse he should be relieved of his duties and put on paid leave of absence until the situation was resolved. He also told the hospital that he intended to report the situation to the Ontario College of Nurses.

9. The hospital has a different version of events. In its submission, it had before it a simple pay dispute that had unaccountably mushroomed into bizarre and spurious charges that there had been criminal misconduct, conspiracy, and a breach of the legislation governing health care professionals. The hospital treated this as a gross over-reaction which might be either the result of stress or symptomatic of psychiatric problems. The Hospital was concerned about that possibility. The hospital advised the grievor to seek an assessment from a psychiatrist of his choice and to submit the results for review. The hospital made that assessment a condition of continued employment. The hospital maintains that had a psychiatrist confirmed that Mr. Leonard was fit to work, he would have been returned to duty immediately.

10. The grievor refused to submit a psychiatric assessment. The hospital terminated his employment.

11. The termination resulted in a grievance which the union filed on the complainant's behalf. That grievance was processed through the steps of the grievance procedure established in the collective agreement. Eventually an arbitrator was appointed to hear the case.

12. But the case was not heard. The night before the hearing the union and the hospital reached a proposed settlement. That settlement was reduced to writing and reads as follows:

IN THE MATTER of an Arbitration arising out of the Grievance of Dennis Leonard

(dated August 3, 1989) Pursuant to a Collective Agreement between **MOUNT SINAI HOSPITAL and ONTARIO NURSES' ASSOCIATION**

B E T W E E N:

ONTARIO NURSES' ASSOCIATION

(The Association)

- and -

MOUNT SINAI HOSPITAL

(The Hospital)

- and -

DENNIS LEONARD

(The Grievor)

MINUTES OF SETTLEMENT

The Parties hereto agree to settle all matters arising out of or related to the above described grievance on the following terms:

1. The Grievor and the Association hereby withdraw the grievance.

2. The Hospital shall pay to the Grievor an amount equal to one (1) month's salary at the Grievor's regular rate of pay plus 14% of said amount as compensation for all benefits, less all statutory deductions.

3. The Grievor hereby resigns from his employment with the Hospital effective July 25, 1989. The Hospital shall amend its records accordingly.

4. The Hospital shall permit the Grievor to remain in his present apartment until November 30, 1989, subject to his obligation to pay the rent. The Grievor agrees to vacate the apartment no later than November 30, 1989.

5. The Hospital has provided to the Grievor a letter confirming his employment history with the Hospital.

6. In consideration for the above payment and promises, the Grievor and the Association, jointly and severally, hereby release and forever discharge the Hospital, its servants, agents and directors of and from all actions, causes of action, claims and demands of every nature or kind arising out of or as a result of or in any way relating to his employment or the cessation of his employment with the Hospital.

7. The Parties agree that this settlement represents no admission of liability whatsoever by the Hospital and that this settlement shall be binding upon them.

8. This settlement is without prejudice or precedent.

DATED AT TORONTO, THIS 12TH DAY OF SEPTEMBER, 1989

"Dennis Leonard"
Dennis Leonard

"Dottye Edwards, E.R.O."
Ontario Nurses' Association

"B. Lanigan-Gilmour"
Mount Sinai Hospital

13. The complainant was advised of the settlement the evening before the hearing and had the opportunity to consider its terms. He signed it. So did the hospital and the union. This complaint was filed about a week later.

14. By the date of the hearing before the Labour Relations Board, both the hospital and the union had complied with their part of the agreement. The grievance was withdrawn and the arbitration hearing cancelled; however, it is not disputed that if the complainant had *rejected* the settlement, the arbitration hearing would have proceeded, as scheduled.

15. The complainant does not claim that, at the time he signed the settlement, he was of unsound mind, ignorant or infirm. Nor does he claim that he could not understand the settlement terms. He *does* claim that he was under improper pressure to accept the settlement, and now believes the terms to be unfair. He argues that the settlement should be enriched or set aside because:

> "my signature on the agreement of September 12th was obtained fraudulently by intimidation through threats of discrimination, misrepresentation, statements of deceit and behaviour that disheartened, misled, and confused"

The complainant seeks to have his case directed to arbitration, without participation by the union or, alternatively, that the Board direct a more generous compensation package and strike out paragraph 6 of the settlement. That paragraph purports to prevent him from bringing any further action against the hospital relating to his former employment.

II

16. The hospital takes the position that it is too late for the grievor to repudiate the settlement agreement. The hospital submits that nothing the grievor pleads could constitute coercion, intimidation or undue influence on its part; and, in any event, it is not a named respondent. It did not and could not breach section 68 of the Act, since section 68 applies only to conduct of the union. If there has been inadequate representation by the union at some point in the process, that is not something for which the hospital is responsible. The hospital argues that, having forgone the opportunity to go to arbitration, the complainant cannot resurrect that option, indirectly, by a complaint against the union under the *Labour Relations Act*.

17. The union submits that the complainant's allegations do not constitute a breach of sections 68 or 70 of the Act and would not support the remedy requested. The union argues that the complainant is trying to use the Board's processes as a means to abrogate or enrich a settlement which he earlier accepted but now considers improvident.

III

18. With this background then, we turn to the complainant's allegations. We will begin with those against Mr. Paliare, the labour lawyer hired by the union to deal with the grievance. Mr. Leonard had a number of complaints about the way in which Mr. Paliare handled the case. It will be convenient to deal with them one by one.

IV

19. Mr. Leonard complains that Mr. Paliare acted contrary to sections 68 and 70 of the *Labour Relations Act* when Mr. Paliare advised him that it would be wiser to give up his intention to sue the hospital for defamation. Mr. Paliare mentioned the time, expense and energy involved in a civil action of this kind. Mr. Leonard complains that Mr. Paliare was not his lawyer for that

purpose and therefore should not have been giving such advice Mr. Leonard argues that these comments by Mr. Paliare support a finding that the union breached sections 68 and 70.

20. We do not accept the complainant's submission. In our view, Mr. Paliare's remarks are merely a recognition of the realities of litigation. They amount to no more than what Professor Pannick had to say in his recent book entitled *Judges*. At page 29 Professor Pannick observes:

> Becoming involved in a lawsuit is like being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains'. Hundreds of thousands of people are exposed to such torture each year, some of them actually choosing to initiate the process. They invariably find the experience painful, protracted, and expensive. When it has run its course, they often realize that it was futile. Yet there remains a queue of victims impatient for their turn.

There is nothing coercive or intimidatory about what Mr. Paliare said to the complainant, moreover, there is no causal connection with either the complainant's trade union activity or the exercise of rights under the Act. There is no breach of section 70.

21. Nor is there a breach of section 68. The union is not obliged to support private civil actions brought by employees against their employer. The proposed defamation action has nothing to do with the collective bargaining relationship or the union's exclusive bargaining agency. Mr. Paliare's advice is totally unrelated. Section 68 has no application.

V

22. According to the complainant, Mr. Paliare told him that the settlement document does not specifically address the payment of rent for the apartment he was occupying. Mr. Paliare said that it was up to the complainant to decide whether or not to pay his rent, and that it was sometimes difficult for landlords to evict tenants for non-payment of rent. Mr. Leonard argues that those remarks establish a breach of sections 68 or 70 of the Act.

23. We do not agree. Mr. Paliare's comments are probably true and in any event do not constitute breaches of section 68 or 70 of the *Labour Relations Act*. If anything, Mr. Paliare is merely advising the complainant that the "deal" which he subsequently signed does not cover some contingencies and that the employer might have difficulty enforcing part of it. It is difficult to see why Mr. Leonard would believe that Mr. Paliare was advising him to "break the law" (his words), but in any case, once again, this has nothing to do with the union's obligation to fairly represent him. The union is obliged to represent the complainant in collective bargaining matters or in disputes concerning the administration of the collective agreement, but we do not think section 68 extends to landlord-tenant matters. Even, if it did, Mr. Paliare's remarks would not support a breach of section 68. We further find that, there is nothing intimidatory about these comments, and no connection with the complainant's union membership or the exercise of rights under the Act. There is no breach of section 70 of the Act.

VI

24. It is not disputed that both Mr. Paliare, and the local union representative told Mr. Leonard that they were not confident that the case would be successful at arbitration. They suggested that the complainant consider the hospital's demand for confirmation of his fitness to work. If a satisfactory doctor's note were provided, the entire matter would be resolved without the cost and uncertainty of litigation. Subsequently both Mr. Paliare and Ms. Edwards suggested that the proposed settlement (reproduced above) might be better than the arbitral alternative.

25. We find that there is nothing intimidatory about either suggestion, nor do they establish the alleged breach of the union's duty of fair representation. Leaving aside the complainant's characterization - "fraudulent", "malicious", "discriminatory" etc.,- there is nothing illegal in a union expressing pessimism about the merits of Mr. Leonard's grievance. There is nothing improper in suggesting that there might be something to the hospital's position that it was entitled to demand that an intensive care/neo-natal nurse establish his fitness to do his job. Nor is there any doubt that in deciding whether the hospital's position was reasonable, an arbitrator might well take into account the professional responsibilities of the complainant's position. That is not, as Mr. Leonard now claims, an assertion by Mr. Paliare or the union that the arbitrator would "discriminate" against him or would not apply "the law". It is simply a recognition of the fact that the hospital had put the complainant's fitness in issue, and in assessing the "reasonableness" of the hospital's position, an arbitrator would likely consider the importance of the grievor's duties. "The law", as the complainant refers to it, permits an adjudicator to consider such matters, and it would be surprising if the arbitrator did not do so.

26. Assuming, as alleged, that the trade union and its counsel related these concerns to the complainant, we do not think that such conduct was contrary to section 68 of the Act. Nor was there any intimidation or coercion within the meaning of section 70. The union's comments have nothing to do with the complainant's membership in the union or efforts to exercise rights unter the *Labour Relations Act*.

27. As we have already mentioned, Mr. Leonard's own assessment of the situation was that the arbitrator would be biased, or would discriminate against him, or would not apply "the law". Mr. Leonard complains that Mr. Paliare did not outline the strategy which he would employ to meet these arbitral reactions should they in fact materialize. This, it is said, amounts to a breach of section 68 of the Act.

28. Mr. Leonard's inferences from Mr. Paliare's remarks are themselves rather dubious, however, even if Mr. Leonard foresaw some potential error or leaning on the arbitrator's part, Mr. Paliare was under no obligation to accept Mr. Leonards predictions or outline his (Paliare's) proposed strategy for meeting such eventualities should they arise. The trade union must represent employees in a manner that is neither arbitrary, discriminatory or in bad faith, and will be vicariously liable should its lawyer conduct himself in a manner inconsistent with that duty. However we do not think counsel is obliged to provide, in advance, a detailed rebuttal for all of the contingencies feared or conceived by a grievor. It may be that a lawyer's investigation, preparation or presentation of a case is so grossly negligent or obviously flawed as to be considered "arbitrary", and that the union will inherit the "sins" of its counsel. But that is clearly not this case. Nor, assuming Mr. Leonard's assertions to be true, would they support a conclusion of bad faith or discrimination. And of course, all of this is entirely hypothetical because the case did not proceed.

29. While the hospital is not a respondent in this proceeding and owes Mr. Leonard no duty under section 68, certain of Mr. Leonard's assertions touch on the applicability of sections 66(c) or 50 of the Act to the hospital's response to his original scheduling complaint. For completeness, those assertions deserve some comment.

30. Mr. Leonard argues that the hospital contravened sections 50 and 66(c) of the *Labour Relations Act* because, as a result of his dispute with the hospital there was friction and disunity within the nursing team. He argues that the hospitals purported concern about fitness to work surfaced only when he threatened to go to the College of Nurses. Mr. Leonard argues that by rejecting his allegations of conspiracy, collusion etc., and demanding that he prove himself fit, *the hospital* committed an unfair labour practice. Mr. Leonard maintains that *the union's* failure to

accept or pursue this alleged unfair labour practice supports the conclusion that it was acting contrary to section 68 of the Act. Sections 50 and 66(c) of the *Labour Relations Act* read as follows:

> 50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.
>
> 66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> • • •
>
> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

31. At common law collective agreements had no legal existence. They could not be enforced in the Courts. Section 50 reverses that result, but must be read in conjunction with sections 44 and 45. They provide that arbitration is the mechanism for resolving disputes concerning the application or alleged violation of collective agreements. To the extent that Mr. Leonard's complaint against the hospital is based upon an alleged breach of the collective agreement he was already on his way to arbitration and mention of section 50 adds nothing. Even if it is argued that section 50 creates a substantive offence (i.e. every breach of a collective agreement is automatically and necessarily a breach of the Act), the Board as a matter of discretion under section 89, leaves the enforcement of collective agreements to the arbitration process contemplated by sections 44 and 45. There is nothing in the circumstances here which would warrant a departure from that approach. Section 66(c) can have no application to the hospital because its actions were not related to Mr. Leonard's membership in the union and the exercise of statutory rights - except perhaps the arguable "right" to proceed to arbitration which the hospital was not in a position to deny, and in fact remained open to him until he accepted the settlement proposal. Accordingly, to the extent that the union "summarily dismissed" these unfair labour practice allegations, it was entirely right to do so. And, if the hospital's alleged reprisal constitutes some breach of the *Health Disciplines Act*, that is something which must be pursued under that statute. Neither an arbitrator or this Board has any jurisdiction.

32. We make no comment on the gestures or facial expressions which Mr. Leonard says accompanied the union's rejection or expression of doubts concerning his analysis of his legal position. It suffices to say that, in general, the union was entitled to form its own opinion or take the advice of its solicitor; moreover the fact that the union disagreed with Mr. Leonard, and said so, or expressed doubts about his interpretation of events or the law, does not establish that it acted illegally.

VII

33. There is nothing wrong in a trade union, or its counsel urging settlement. Indeed, that is precisely what the grievance procedure is for. In *Catherine Syme*, [1983] OLRB Rep. May 775 the Board had this to say:

> 20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration.

> The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.
>
> 21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

If union officials expressed doubts about the grievor's likelihood of success, or suggested that he comply with the hospital's request as a simple way of resolving the matter, those actions do not amount to a breach of section 68 of the Act. The union was merely exploring the ambit of the problem as it was entitled to do; and, as we have already said, had Mr. Leonard opted to proceed to arbitration, the case would have proceeded. Ultimately, the option was his.

VIII

34. It was not unreasonable or arbitrary for the union to suggest that there might be certain "technical" arguments which could support the complainant's position quite apart from the merits of his case. There is arbitral authority that, in some circumstances, the absence of union representation at the point of termination can invalidate a discharge despite the presence of just cause. Nor was it improper for the union to remind the grievor that even if he won on this "technical" basis, his future employment might still be in jeopardy if the hospital renewed its demand for proof of fitness before continuing the complainant in his former position. Neither of these actions constitute a breach of section 68 of the Act. On the contrary; they indicate that the union was being thorough, and was cognizant of the realities of the situation.

IX

35. Mr. Leonard agrees that he was advised of the proposed settlement on the evening before the arbitration was to begin, and that he had the opportunity to consider the settlement terms. Those terms are set out above, and are relatively simple and straight forward. The complainant is not an unsophisticated man. He does not claim that he did not understand what he was signing. Mr. Leonard does claim that there was "intimidation, misrepresentation and deceit" but on this key point, there are simply no facts pleaded which would support such allegation. No doubt Mr. Leonard was disheartened that the union did not share his optimism and expressed the view that an arbitrator might be sympathetic to the hospital's position. But a union is not obliged to agree with a grievor's position or legal anaysis, and the fact remains that, knowing the union's views, the complainant signed the settlement anyway. We are simply not satisfied on the pleadings, that the complainant has made out any basis for setting aside the settlement enriching its terms to which all parties had agreed as a resolution of his dispute with the hospital, or directing the arbitration option which Mr. Leonard himself earlier objected.

36. It is unnecessary to consider the hospital's submission, that even if there were some misconduct on *the union's* part, there is no jurisdiction to order *the hospital* to proceed to arbitration

or direct the hospital to provide more generous payments. Nor need we speculate about the effect of paragraph 6 should the complainant launch a civil action. That is for a Court to decide.

37. For the foregoing reasons, this complaint is dismissed.

3006-89-FC Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Peacock Lumber Limited,** Respondent

First Contract Arbitration - Employer's proposal to take three employees out of bargaining unit and initial refusal to provide negotiating data indicating refusal to recognize union's bargaining authority - Employer's wage proposal of only one wage rate at a level of the lowest rate being paid to employees constituting uncompromising proposal without reasonable justification - Process of bargaining found to be unsuccessful even though only two bargaining sessions held - Inexperience of employers' negotiator not a mitigating factor - Board directing the settlement of a first collective agreement by arbitration

BEFORE: *Judith McCormack,* Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies.*

APPEARANCES: Robert McKay and *Dan Garvey* for the applicant; *Vincent P. Johnston, Terry Vail* and *Vince Portincasa* for the respondent.

DECISION OF THE BOARD; May 25, 1990

1. This is an application for a direction that a first contract be settled by arbitration. On April 2, 1990, the Board issued the following decision:

> We direct the settlement of the parties' first contract by arbitration. Our reasons will follow.

We now provide our reasons.

I The Facts

2. The respondent is a wholesale and retail lumber and hardware company which sells building supplies. Although levels of employees fluctuate, it appears that there are approximately nineteen employees in the bargaining unit at the present time. The applicant was certified as the bargaining agent for those employees on October 4, 1989. Neither the respondent nor anyone on its behalf attended the certification hearing.

3. Dan Garvey, a business agent for the applicant, was assigned to service the unit, and he accordingly gave notice to bargain on October 26, 1989. In the same letter containing the notice to bargain, he also requested a list of bargaining unit employees for negotiating purposes showing their seniority, classifications and wage rates. There was no response to the notice to bargain and as a result, Mr. Garvey telephoned the respondent's owner, J. Clair Peacock, on a number of occasions to arrange dates for negotiating meetings. Each time he was told that Mr. Peacock was out or on vacation. Although he left a number of messages, his calls were not returned. Eventually, Terry Vail called him on November 27th and advised him that he would be representing the respondent

in negotiations. Mr. Vail was first hired by the respondent in December of 1988 as a shipper/receiver. Subsequently he became a retail salesperson and he now handles a variety of office duties, including some hiring. Prior to these events he had no experience in labour relations or collective bargaining.

4. Mr. Vail also told Mr. Garvey that some employees did not wish to reveal the information he had requested, and that the respondent would not provide it unless the applicant produced a signed authorization from each employee. Mr. Garvey's view was that the applicant was entitled to this information in its capacity as the certified bargaining agent, and he therefore sent Mr. Vail excerpts from the *Labour Relations Act* and a reference to *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49. Mr. Vail did not look into this case, and although he reviewed the excerpts from the Act, he was not convinced that the respondent was required to furnish the information requested. He made it clear to Mr. Garvey that the respondent continued to insist upon written authorizations from all employees, and that he would not even discuss dates for negotiating meetings until such authorizations were obtained. In fact, Mr. Vail told the Board that the respondent wasn't prepared to bargain unless this issue was resolved first.

5. Mr. Garvey then applied for conciliation. When the respondent was notified of his request, Mr. Peacock objected to the appointment of a conciliation officer. In a letter to the Assistant Deputy Minister of Labour on December 1st, 1989, he reiterated the respondent's position that written authorizations were required for the information requested, and that they would commence the bargaining process, including arranging a date for an initial meeting, after receiving such authorizations. A conciliation officer was appointed on December 11, 1989 and a conciliation meeting was scheduled for January 15, 1990. On December 14th, at the suggestion of the conciliation officer, Mr. Garvey sent Mr. Vail a set of proposals for a collective agreement which he hoped would expedite matters at conciliation. He did not include the applicant's wage and benefit proposals, but told Mr. Vail that he would do so later when he got the wage information from the respondent.

6. On January 15, 1990, the parties met in conciliation. Mr. Vail and Vince Portincasa, another office employee, represented the respondent, and Mr. Garvey and Jim Kehoe, a bargaining unit employee, represented the applicant. On that day quite a number of basic non-monetary items were agreed upon by the parties, including a purpose clause, a recognition clause, a number of union security provisions, a grievance procedure, a management rights clause, certain seniority provisions, a no strikes/no lockouts clause, and so forth. Sometime during that day, the applicant gave the respondent its wage and benefit proposals. At the end of the day, the respondent produced a list of employees with their dates of employment and hourly rates listed. Since there were six different wage rates but no classifications listed, the applicant asked for their classifications. The respondent then orally provided what Mr. Vail described as their "job functions" which Mr. Garvey wrote down next to each employee's name. There are six of these categories including stick operator, driver, labourer, forklift, shipper/receiver, and mill helper. Mr. Garvey testified that these were described as classifications by the respondent, and that Mr. Vail agreed to provide him with a "clean" copy of the list with these classifications on it at the next meeting.

7. A second conciliation meeting was scheduled for January 26th. Initially, the parties were able to agree on some of the outstanding items. By the end of the day, however, the respondent had announced what it described as its final positions on a number of matters in dispute, and indicated that it was not prepared to move from those positions. The meeting broke up. Mr. Garvey subsequently sent a summary of the items agreed upon by the parties to the respondent and applied for a no-board report. On February 6th, the Deputy Minister issued a no-board report. The parties were then approached to see if they wished to avail themselves of mediation. The

applicant indicated interest; the respondent declined. On March 6th, the applicant initiated these proceedings.

8. We now turn to a more detailed review of negotiations. Mr. Vail had considerable difficulty remembering what had happened in the bargaining sessions. His testimony was vague and he told the Board that he had not taken as many notes as in hindsight he wished he had, no doubt because of his inexperience which he candidly admitted. This approach resulted in some problems during the proceedings. The applicant pointed out that while the respondent filed material indicating that it agreed with the applicant's description of the clauses that had been settled during bargaining, the language for some of those clauses included in the respondent's proposed collective agreement was different from that of the applicant's. When asked to clarify this point, Mr. Vail advised variously that he could not remember what had been agreed to, that he thought that two obviously different clauses meant the same thing, and/or that perhaps Mr. Peacock or Mr. Portincasa had changed the language when they filed the respondent's material while Mr. Vail was on vacation. In light of Mr. Vail's vagueness and difficulty in remembering events, where his evidence conflicted with Mr. Garvey's we have preferred the evidence of Mr. Garvey. However, for the most part the facts were not in dispute. The following are some of the outstanding bargaining items relevant to the issues before us.

Wages

9. On January 15th, Mr. Garvey initially proposed wage increases of $2.00 in each year of the collective agreement for each employee from his or her present wage rate. He indicated to the respondent, however, that he usually proposed increases of $2.00 or $2.50 an hour as a blanket proposition, that the applicant didn't expect to get this and that nothing was hard and fast. It was, he said, a place to start. He also told Mr. Vail and Mr. Portincasa not to be afraid of the numbers, the months or the classification spaces listed on his proposal, that the classifications were negotiable and that that was why he had left them blank.

10. On January 26th, the respondent proposed one wage rate described as the rate for "labourers", starting at $7.95 an hour and changing to $10.50 an hour after three months. This was the lowest rate the respondent was already paying to employees. There were to be no increases at that time and any subsequent increases were to be granted at the respondent's discretion. The respondent was not willing to have any classifications in the collective agreement other than that of "labourers". Mr. Vail testified that this position was final and that the respondent was not prepared to move from it. He told the Board that this rate was better than a local unionized competitor was paying, and that that was the reason for the respondent's proposal. It was not suggested that the respondent could not afford to pay more; in fact, Mr. Vail testified that the respondent was in the habit of granting unilateral increases to employees of four to five per cent in June or July of each year. Although he was initially a little unclear on this point, he eventually confirmed in re-examination that the respondent would continue to pay a summer increase. However, Mr. Vail admitted that he did not advise the applicant of this, and it was apparent from his testimony that the respondent was not prepared to negotiate such an increase with the applicant or include it in the collective agreement. In addition, the respondent was not willing to change its position on the issue of putting classifications into the collective agreement.

Christmas Bonus

11. Mr. Vail confirmed that the employer also regularly paid employees what Mr. Garvey described as a Christmas bonus. This was most recently paid in December of 1989 as a result, the parties agreed at the hearing, of section 79 of the *Labour Relations Act* which freezes working conditions. The applicant wished to have this payment of one week's salary incorporated into the col-

lective agreement. Mr. Vail characterized this payment as an "appreciation payment" and told the applicant that it was available to employees while they were non-union. Now employees would only have what the union could negotiate in the collective agreement. At different times in his testimony, Mr. Vail seemed to suggest both that the respondent would not be paying the Christmas bonus because of the cost of other clauses to which it had agreed, and that it would be paid as usual. In any event, there was no question that the respondent was not prepared to put it in the collective agreement, and when Mr. Garvey suggested that they discuss the matter, Mr. Vail told him it was not a topic for discussion. Mr. Vail informed the Board that the respondent was not in the habit of excluding any employees from this payment, whether they were union or non-union. However, he also testified that the respondent was not prepared to move from its position that the appreciation payment was not a subject for negotiations.

The Bargaining Unit

12. The respondent proposed that three employees on the list it had given to the applicant be excluded from the bargaining unit because they did not want to be part of the union. Mr. Vail also told Mr. Garvey that they considered one of these employees to be a maintenance supervisor, and thus excluded because he exercised managerial functions. This employee is described on the respondent's list as a "mill helper". The applicant opposed this proposal on the basis that the respondent was attempting to alter the bargaining unit.

Benefits

13. The applicant initially proposed a package of nine benefits, including the Christmas bonus. Subsequently, Mr. Garvey withdrew four of these items, with the effect that the union's position amounted to small improvements in the status quo, together with a dental plan. Some of the items withdrawn were predictable; for example, a request for employer-paid OHIP became redundant as a result of legislation. Mr. Vail agreed that Mr. Garvey was willing to discuss the benefit plans further. The respondent's position was that its present group plans should continue without any changes, and that it was not willing to provide a dental plan for bargaining unit employees. Again Mr. Vail indicated to Mr. Garvey that the respondent was not prepared to move on this position.

Vacations

14. The respondent and the applicant were able to agree on much of the language in the vacation clause, although because of the conflict in what the respondent acknowledged had been agreed upon previously and the material it subsequently filed, it was a little unclear how much of the clause remained in dispute. There was no question that the parties were still at odds on the method of payment and entitlement. The applicant wanted vacation entitlement to be based on the length of an employee's service, with vacation pay calculated on the basis of the corresponding number of weeks' salary. The respondent took the position that vacation entitlement should be based on an employee's job function, and vacation pay was to be in the amounts and form set out in the *Employment Standards Act*.

II Decision

15. The respondent's primary argument opposing this application was that the parties had only had two bargaining sessions and that negotiations had not broken down; in other words, the application was premature. According to counsel, the fact that the respondent had a four or five per cent wage increase "in its pocket" indicated that there was potential for further bargaining. (Mr. Johnston was not retained until the second day of the hearing, and as a result, did not have

the benefit of hearing the union's evidence.) The respondent's views were reflected in Mr. Vail's testimony when he told the Board that he felt negotiations had come to an abrupt end and that there were other items that could have been discussed in an additional negotiating meeting. However, in cross-examination he was unable to point to any items which he felt would benefit from further discussion, except perhaps an additional holiday proposed by the union and one of the union security provisions. And although in his view negotiations seem to break down quickly on the issue of wages and benefits, he confirmed that the respondent was not prepared to change his position on these items.

16. The applicant, on the other hand, was of the view that once the respondent indicated it was not prepared to negotiate further on key issues such as wages and benefits, it was obvious the parties had reached an impasse. As a result there was no point in continuing to go through the motions of bargaining when in reality the parties were deadlocked. In the applicant's opinion the bargaining issues had been fully discussed, and the respondent was simply not prepared to conclude a collective agreement.

17. Section 40 provides in part as follows:

> 40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.
>
> (2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
>
> (a) the refusal of the employer to recognize the bargaining authority of the trade union;
>
> (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
>
> (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
>
> (d) any other reason the Board considers relevant.

18. In *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, the Board described section 40a as a "unique facilitative tool", which reflects the Legislature's acknowledgement of the significance of a first collective agreement. It does not, however, supplant the primacy of the collective bargaining process and although the section should be given a liberal construction, it was not intended to provide automatic access to arbitration in all cases where parties cannot agree. Instead there must be a causal connection between one of the conditions set out in section 40a(2) and the unsuccessful negotiations (*Nepean*, *supra*). The simple fact that there is no collective agreement does not necessarily mean bargaining has been unsuccessful (*Teledyne Industries Canada Ltd.*, [1986] OLRB Rep. Oct. 1441 and *Juvenile Detention Centre (Niagara) Inc.*, [1981] OLRB Rep. Jan. 66). However, as a matter of common sense, that fact will be useful in the Board's determination of this issue.

19. In this case, we do have some concerns about the length of the bargaining process. Two negotiating sessions is an unusually short course of bargaining, and we do not wish to intervene in the process prematurely. On the other hand, the form of negotiations varies considerably from case to case and the Board has noted previously that there is no minimum number of bargaining

sessions required (*Teledyne*, *supra*). Rather, the issue is whether negotiations have been unsuccessful. Here the parties were able to arrive at agreement on a number of basic items quite rapidly. Similarly, those items remaining in dispute crystallized in very short order. By the end of the second day, it was apparent that the respondent's position had already hardened on a number of key items. Having carefully reviewed the outstanding items between the parties, we concluded that despite the length of the bargaining process, the parties were indeed at an impasse. It may well have been that additional bargaining sessions could have cleaned up several minor matters. However, we agree with Mr. Vail's assessment that the bargaining broke down over wages and benefits, and on those items, while the applicant continued to indicate flexibility, the respondent made it clear that it was not prepared to move. This was reinforced by the respondent's rejection of mediation. In our view, the short duration of negotiations was a symptom of the underlying conflicts between the parties, rather than an indication that more potential for bargaining remained. The fact that the respondent was willing to pay a summer increase does not suggest to us that there was potential for further bargaining, when Mr. Vail testified that the respondent was not willing to move from its "no-increase" position and that any increases would be paid unilaterally.

20. We have considered the possibility that the respondent was characterizing its positions as final as a bargaining ploy or as a result of inexperience, while still remaining willing to bargain. Labour negotiations are often carried out in a specialized code in which variations in the parties' positions are expressed obliquely, and the subtext is as important as what is actually said. In this case, however, there appeared to be no misunderstanding; Mr. Vail indicated quite bluntly to Mr. Garvey that the respondent was not prepared to move on items such as the wages, benefits and Christmas bonus, and confirmed in his testimony that this was in fact the case. In these circumstances, it is difficult to say that an additional meeting would have had a significant impact on the situation.

21. The Board has noted in the past that a party is not required to continue negotiating if it is evident that such negotiations will be fruitless (*Nepean*, *supra*). In the overall context of this set of negotiations, it is unrealistic to suggest that the parties should return to the table to address, for example, an additional holiday, when it is evident that bargaining had come to a halt on wages and benefits.

22. We do observe that the applicant moved rather quickly from one stage of bargaining to the next. However, at the time the applicant applied for conciliation, the respondent was refusing to set dates for bargaining until the applicant provided authorizations from employees for the wage data. There was no reason why at least the non-monetary issues could not have been addressed at that point, regardless of this dispute, and of course, the applicant's view that it was entitled to this information is confirmed in the Board's jurisprudence. (See, for example, *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49; *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in *Re Tandy Electronics Ltd., and United Steelworkers of America et al.* (1980), 30 O.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980); *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, [1983] OLRB Rep. July 1138, 83 CLLC 16,055; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411; *The Windsor Star*, [1983] OLRB Rep. Dec. 2147; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] OLRB Rep. May 705; *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453; and *Co-Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. Sept. 1213.) As a result, it is not difficult to understand why the applicant was impatient to move events along. It was also evident from Mr. Garvey's testimony that he felt that the conciliation officer might play a useful role in resolving the authorization dispute.

23. It is not so unusual for a party to apply for a no-board report after two sessions of conciliation; it is simply that there is usually some bargaining preceding conciliation. In this case, however, by the end of the second conciliation meeting, negotiations had already jelled to the point where a meaningful assessment could be made about the futility of continuing. As a result, we do not think it can be said that either the no-board application or this application were made prematurely. In the circumstances before us, the applicant was entitled to attempt to bring matters to a head in an expeditious way. We do not find that the applicant was essentially attempting to by-pass negotiations so as to bring this application. Rather, Mr. Garvey's testimony was consistent both with a commitment to bargaining on the one hand, and an unwillingness to waste time or to be led down the garden path on the other. As a result, we concluded that the process of bargaining was unsuccessful.

24. We now turn to the reasons for that lack of success. The applicant argued that the respondent's initial refusal to provide the wage data represented a failure to recognize the union's bargaining authority under section 40a(2). In addition, Mr. McKay was of the view that the respondent's proposals to remove three people from the bargaining unit amounted to an attempt to press an alteration in the bargaining unit to an impasse.

25. Addressing the last point first, we note that the respondent agreed to a bargaining unit description in the collective agreement reflecting the certificate issued to the applicant, and no proposals were made to amend that description. In addition, it was not clear that the proposal to take three people out of the bargaining unit was either considered to be or described as a final position by the respondent. In these circumstances, we do not find that the respondent's position amounted to an attempt to alter the bargaining unit which was pressed to an impasse in a manner which has been considered bad faith bargaining. There may be situations where discussions to remove certain people from the bargaining unit will constitute an attempt to alter the unit, despite the fact that no changes are proposed to the description, but this was not such a case. It was also apparent that the respondent had a change of heart with respect to the wage data, and as a result, we do not intend to make much of the initial refusal in itself.

26. However, both the proposal to take three people out of the bargaining unit because they did not wish to be in the union and the initial refusal to provide negotiating data reflect a general approach taken by the respondent which is more problematic. (We should add that we are somewhat skeptical of the respondent's characterization of one employee as a "maintenance supervisor" when several hours later Mr. Vail and Mr. Portincasa described him to the applicant as having the job function of a "mill helper"). These proposals, together with the respondent's positions on wages and benefits and the Christmas bonus, seem to indicate some difficulty in accepting the role of the union on the part of the respondent. Essentially, the respondent's proposals on the key monetary items amounted to either no change, or a reduction in the status quo. In the context of this case, these proposals suggest that the respondent wished to make it clear to the employees that the applicant had obtained no tangible benefits for them, and had even caused a reduction in those benefits. Our concern in this regard is strengthened by the respondent's apparent willingness to continue both the Christmas bonus (although as mentioned earlier, Mr. Vail's testimony was conflicting on this point) and the annual summer wage increase, despite its flat refusal to negotiate these items into the collective agreement. It is difficult to avoid the conclusion in these circumstances that the respondent was attempting to communicate to employees that the union had obtained for them nothing more than the respondent was already providing.

27. To the extent that these positions reflect an unwillingness on the part of the respondent to reconcile itself to a collective bargaining regime, we think that they amount to a refusal to recognize the union's bargaining authority. We say this despite the fact that the respondent was eventu-

ally prepared to sit down and negotiate over a significant number of standard collective agreement provisions. The respondent's key proposals were likely to have the effect of undermining the union's authority and credibility with employees, and the fact that it was willing to agree on a number of other standard provisions does not redeem its conduct in these circumstances.

28. We also find the respondent's wage proposals to be both uncompromising, and without reasonable justification. There was no dispute that the respondent was not prepared to move on its wage proposals, and thus we have little difficulty in concluding that it was uncompromising. However, under section 40a(2)(a) a party's position must lack reasonable justification as well. Our concern about the respondent's negotiating stance in this regard is two-fold. Firstly, the refusal to put any classifications in the collective agreement except the lowest one of labourer does not seem well-grounded when by the respondent's own admission, it was paying at least six different wage rates tied to what it described as "job functions". We understand the concern expressed by Mr. Vail that too many classifications would be restrictive in a small operation. However, Mr. Garvey indicated in negotiations that the applicant was prepared to negotiate the number and nature of classifications. A blanket refusal to have any more than one classification in the collective agreement, and the lowest extant classification at that, goes beyond the concerns expressed by Mr. Vail. To the extent that this proposal would amount to a reduction in wages for some employees, we also find this case analogous to that of *MacMillan Bloedel Building Materials Limited*, [1990] OLRB Rep. Jan. 58.

29. There was some suggestion by Mr. Vail that the respondent was prepared to continue to keep on paying the different wage rates, but not willing to incorporate them into the collective agreement. It was not clear whether this was communicated to the applicant in negotiations. But even if this was so, again it raises the question of why the respondent adamantly refused to incorporate these rates into the collective agreement if it was prepared to keep on paying them.

30. Secondly, we find it difficult to understand why the respondent would be prepared to grant employees a four or five per cent annual increase in June or July, but insist that there be no increase whatsoever in March. As noted earlier, it was not even suggested that the respondent's position on wages was a matter of economic necessity, and no other rationale was provided. In addition, the respondent's unwillingness to incorporate even the summer increase into the collective agreement or to discuss any increase at all with the union was unreasonable in the circumstances before us. No justification was offered for this disparity in the respondent's approach, either at negotiations or in the proceedings before us. Under these circumstances, we concluded the respondent's refusal to move on its wage position amounted to an uncompromising bargaining position adopted without reasonable justification.

31. Counsel for the respondent argued that the respondent should not be penalized for Mr. Vail's admitted inexperience, and that parties should not have to hire lawyers to negotiate for them. It may be that at least part of the problem in this case was as a result of inexperience. However, no antipathetic animus is required under section 40a (*Crane Canada Inc.*, [1988] OLRB Rep. Jan. 13). Indeed, in *Formula Plastics Inc.*, [1987] OLRB Rep. May 702 the Board observed that section 40a is not a penalty for egregious conduct, but a special mechanism which may apply even where the respondent's conduct stems from inexperience:

> 39. We note particularly that the provisions of 40a(2)(b) are not necessarily predicated on any egregious conduct on the part of an employer. There is no requirement of bad faith or anti-union animus (although these factors may be relevant) and a direction to settle a first contract by arbitration is not a penalty visited upon an employer. Rather, section 40a as a whole represents the identification of a series of situations in which the Legislature has determined that a malfunctioning labour relationship requires a special mechanism to repair or strengthen it.

> Indeed, it may well be that some of the provisions of section 40a will apply even where the respondent's conduct stems from ignorance, inexperience or ineptitude.

And while we do not suggest that parties must require their representatives to have any particular qualifications, it is also true that if they send inexperienced or ill-prepared negotiators to the table, they may have to live with the consequences (see *Crane Canada*, *supra*, and *Co-Fo*, *supra*).

32. In this case Mr. Peacock is himself a lawyer, although not one familiar with labour law, according to Mr. Vail. If Mr. Peacock chose to have Mr. Vail conduct negotiations on the respondent's behalf, we are not prepared to say that a situation which otherwise fits within section 40a should be exempted from the reach of that section as a result of Mr. Vail's inexperience.

33. For all these reasons, we directed the settlement of the parties' first contract by arbitration.

0239-89-R; 0240-89-U Toronto Typographical Union, Number 91, Printing Publishing and Media Workers Sector of the Communications Workers of North America, Applicant v. Innopac Inc., **Progressive Packaging Limited,** Condor Laminations, Respondents; Toronto Typographical Union, Number 91, Printing Publishing and Media Workers Sector of the Communications Workers of North America, Complainant v. Innopac Inc., Progressive Packaging Limited, Condor Laminations, Respondents

Bargaining Rights - Interference in Trade Unions - Related Employer - Remedies - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the unoin given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

BEFORE: *S. A. Tacon,* Vice-Chair, and Board Members *M. Rozenberg* and *P. V. Grasso.*

APPEARANCES: *Nelson Roland, Douglas W. Grey* and *Harriet Simand* for the applicant/complainant; *David Brisbin, M. B. Cooke* for Progressive Packaging Limited and *Ted Hutcheson* for Innopac Inc.

DECISION OF S. A. TACON, VICE-CHAIR, AND BOARD MEMBER M. ROZENBERG; May 4, 1990

1. Board File 0239-89-R is an application pursuant to section 1(4) of the *Labour Relations Act* wherein the applicant seeks a declaration that the respondents constitute a single employer for purposes of the Act. Board File 0240-89-U is a complaint under section 89 of the Act in which the

complainant alleges contravention of sections 3, 15, 64, 67, 70 and 72. The gravamen of the complaint involves the transfer of work from Condor Laminations to Progressive Packaging and the resultant layoff of approximately one-half of the bargaining unit employees, the failure to hire laid-off Condor employees at Progressive and the letters to employees to be laid-off, as well as wage increases and a bonus paid to Progressive employees and certain asserted "anti-union" remarks attributed to various management personnel at Innopac Inc. The applicant/complainant, the Toronto Typographical Union, is the bargaining unit agent for employees at Condor, and, for ease of exposition, is referred to as the "union".

2. The matter proceeded on the basis that Purity Packaging was not involved as a separate entity and, so, the Board directs that the style of cause be amended accordingly. It was not disputed that Innopac Inc. (Innopac) controlled a number of other companies or divisions, including Condor Laminations (Condor) and Progressive Packaging (Progressive).

3. With respect to the section 1(4) application, counsel for the respondents conceded that the requisite statutory criteria had been met and, further, that Progressive was a successor employer to Condor and, thus, bound by the current collective agreement between the union and Condor. The scope clause of the Condor collective agreement is limited to the "Municipality of Metropolitan Toronto". Progressive is located in Aurora, Ontario. The respondents assert that relief in the section 1(4) application should be limited to a declaration and should not include a change in the scope clause so as to include the Progressive plant, and thereby, make the union the bargaining agent for employees at Progressive. The union seeks such an extension as part of the 1(4) declaration and/or the relief requested the redress the asserted violations in the section 89 complaint. The union seeks other categories of relief as well, as set out in Schedule C of the complaint.

4. The Board, in an oral ruling which need not be reproduced herein, dismissed as premature the respondent's preliminary motion seeking to limit the relief in the section 1(4) application and/or 89 complaint to a declaration and to reject the remedy of "rewriting" the scope clause to include the Progressive location. The Board commented that it may very well be that the union is not successful in establishing the factual foundation it asserts or, even if that is achieved, the Board may not be persuaded that the requested relief - admitted as "novel" by counsel for the union - is appropriate. That decision, in the Board's view, should only be made with the benefit of the full factual context and submissions of the parties.

5. During the course of the proceedings, the Board heard nine witnesses. As well, extensive documentary material was filed. The Board has assessed the credibility of the witnesses according to the usual criteria. In reaching its factual findings, the Board has considered the relative credibility of the witnesses in the context of the documentary material and what is reasonably probable in the circumstances. With respect to credibility, the Board would here comment that L. Bednar and T. Lawton were not considered credible witnesses and their testimony has been rejected wherever it conflicts with that of M. Fabi and M. Beauvais respectively. With regard to Bednar in particular, the only portion of his testimony which was accepted related to his views of unions and the certification of Condor and his authorship of aspects of the 1987/88-89/90 strategic plan (Exhibit 24). The remainder of his testimony is viewed as self-serving and implausible in the circumstances. The Board has additional comments with respect to credibility *infra* as appropriate.

6. The Board has not sought to give a detailed exposition of the facts; rather, only those considered relevant to the issues or to an understanding of the context are set out.

FACTS

7. Innopac controls a number of companies in the United States and Canada, at some 23 locations, which manufacture various forms of plastic packaging. The companies are grouped into categories such as foam products, injection moldings, flexible packaging and corrugated plastics, rigid packaging systems and impact extrusions. Products include containers and packages for food products (e.g., snacks, yoghurt, creamers), containers for fast food (foam cups and trays), tubes for pharmaceutical products and bags. Some of the companies (11 of the 23 "units") are unionized. In Ontario, those include: Condor in Toronto (The Toronto Typographical Union); Purity Packaging in Peterborough (Canadian Paperworkers Union); Montebello in Hawkesbury (United Steelworkers of America); Fibracan in Mississauga (Teamsters). In the United States, some are unionized as well, such as, Purity Packaging in Columbus, Ohio and Continental Extrusion in New York.

8. It is useful at this point to sketch the reporting structure at Innopac over the relevant period. The President and CEO of Innopac is M. Fabi, who commenced his duties in October 1986. Innopac's other officers include Vice-Presidents of Human Resources, Information Systems, Finance and Secretary. The Vice-President of Human Resources was one Forbes West who left in April 1989 and was replaced by R. Reynolds. Reporting to West (and then to Reynolds) was T. Hutcheson (Corporate Director of Industrial Relations). The Vice-Presidents all reported to Fabi. Each "group" of companies had a group president. Two such group presidents are relevant to these proceedings. One, R. Anderson, was group president of "flexible packaging and corrugated plastics" until he was asked to leave the company in March 1989. Reporting to him was M. Finnegan (Vice-President or Director Technical Process Development) who was also asked to leave in May or June 1989. Finnegan's responsibilities dealt with the technical side and he never had any operating responsibilities in respect of Condor; his position was not with Innopac itself but Strout Plastics. Anderson's "group" at one point consisted of Strout Plastics, Coroplast Inc., Continental Extrusion and Condor. In January 1988 responsibility for Condor was transferred to M. Cooke, another group president. Cooke's responsibilities included Purity Packaging (from Fall 1988), Condor (from January 1988), Montebello Metal (from September 1989) and Progressive (from its purchase in January 1989). The group presidents all reported to Fabi as well.

9. Condor was purchased by Innopac in July 1983. Its business primarily involved the manufacture of plastic packaging for meat and cheese products in vacuum packs. From 1984 until he was demoted to Director of Sales Marketing in September 1987, Bednar was Vice-President and General Manager. Bednar was replaced in September 1987 by P. Galaski until December 1988 when Galaski left. Bednar himself was terminated as of February 1, 1988. The union was certified as bargaining agent in March 1986 and the first collective agreement was ratified August 5, 1986.

10. Condor was increasingly unprofitable. Its equipment was antiquated and inefficient; its administrative overheads were not supported by its level of business. The specific market in which Condor operated was highly competitive and responsive to price. Moreover, the market itself was declining as the consumption of meat and cheese products decreased. Condor's sales volume was dropping as a result of competitive pressures and the depressed market for meet and cheese. In 1988, for example, Condor lost $1 1/2 million dollars; in 1989, although its business plan called for the company to break even, the firm was on track to lose $2 1/2 million dollars. In the circumstances, Innopac was reluctant to commit the substantial monies needed to update Condor's obsolete equipment but did seek to turn the company around through a management shake-up. For example, Bednar was demoted then terminated; Galaski, Bednar's successor as Vice-President and General Manager, departed in December 1988. As well, responsibility for Condor was moved to

Cooke from Anderson in January 1988. As noted, Anderson himself was asked to leave Innopac in March 1989.

11. Fabi, as President and CEO, was not involved in the day-to-day operations of the various companies controlled by Innopac. One of his objectives was to balance Innopac's portfolio, i.e., reducing its dependence on foam products. In that connection, Fabi sought to acquire companies which would complement and diversify Innopac's current holdings. For example, in 1988, Continental Extrusion was purchased. Continental specialized in square-bottom bags for upscale retail and consumer markets and extended Innopac's existing specialty bag line. An "acquisition candidate profile" was developed and tendered in evidence (Exhibit 6).

12. Progressive Packaging, a plant in Aurora, Ontario, fit that acquisition candidate profile perfectly. The company had expanded rapidly from 25,000 square feet in 1979 to 100,000 square feet in 1989 and employed approximately 125 workers. The company produced packaging primarily for the snack food industry, such as, plain and printed film, and specialty bag products. The equipment was modern to state of the art. Progressive was a privately held company; J. Reid was President and owner.

13. In late 1987 or early 1988, Fabi contacted Reid about purchasing Progressive but was rebuffed. Some six months later, Fabi contacted Reid again. This time, Reid was more responsive and agreed to sell. The meetings and various due diligence inquiries continued over a period of several months but culminated in the sale closing on January 12, 1989. The impending sale was announced to Progressive employees by Reid on December 14, 1988. Prior to that, Reid had insisted on complete secrecy in case the deal fell through. At Fabi's request, Reid agreed to remain as President of Progressive to provide continuity, particularly since Innopac operated on a decentralized basis with the individual units exercising considerable autonomy. In the negotiations for the sale of Progressive, Reid indicated he wished to pay his employees a "bonus" out of the proceeds of the sale to reward their years of local service. Fabi did not object provided the monies came out of the purchase price; Innopac's auditors reported no irregularities with that payment. That is, the substantial bonuses, totalling over $1 million dollars and calculated by length of service, were announced by Reid on December 14, 1988 and were totally his responsibility. Innopac was in no way connected with or liable for these monies.

14. Fabi, in conjunction with D. White (Vice-President, Finance and Secretary), prepared a document on the prospective purchase of Progressive for presentation to the Innopac Board of Directors for their approval. That document (Exhibit 23) covered a variety of topics, including executive overview, impact on earnings per share, description of transaction, target company, plans for integration and financial analysis and will be dealt with in more detail *infra*. The Board did approve the acquisition and, as noted, the deal closed on January 12, 1989. Following the sale, Innopac was not involved in the day-to-day operations of Progressive. The management team at Progressive, headed by Reid, continued as before.

15. Wage increases at Progressive were generally given annually in October. The company had experienced particular difficulty in attracting and keeping employees at the entry level. A wage survey was conducted and, in March 1988, wages were adjusted to increase Progressive's competitiveness and further adjustments were made in October 1988 in addition to the across-the-board increment. The difficulty in attracting and retaining entry level candidates continued, however, and in early 1989 another, more formal, wage survey was prepared by V. Bewes, personnel manager at Progressive. This process resulted in further wages increases primarily at the starting levels (e.g., helpers, trainees) in March and April 1989. Those increments were recommended by J. Grech (plant manager at Progressive) and approved by Cooke (group president).

16. Progressive traditionally hired employees for entry level positions and its workers then moved through the ranks from labourer and helper/trainee positions to experienced operators. The turnover existed at the lower levels. For several reasons, the company, with rare exceptions, did not seek out experienced operators from competitors to fill senior positions which became vacant . Firstly, differences in machinery meant that even experienced operators elsewhere needed training to adjust to Progressive's equipment and operations. More critically, employees who had progressed through the ranks expected those promotions and the impact on morale of "parachuting" outsiders into those coveted jobs was considered destructive. Occasionally, an experienced external person would be sought if a new process or piece of equipment was introduced. For example, a new type of extruder laminator was put into operation in May 1989 and the position was advertised but was eventually filled internally. At the time of purchase by Innopac, there were approximately 125 employees at Progressive.

17. When Fabi took over as President and CEO, the various companies controlled by Innopac were instructed to prepare strategic plans. In early 1987, the first strategic planning session was held in Florida; Fabi, senior Innopac staff, the various group presidents and vice-presidents/ general managers attended. There were presentations, including historical summaries, given by the management at each company. Bednar was present for part of the time at the 1987 meeting and addressed the group as to Condor's history. Those meetings have continued on an annual basis but with a somewhat smaller group. The comments allegedly made by Fabi at the Florida seminar in 1987 are considered later in some detail.

18. Although Progressive and Condor operated in different markets, it was considered feasible to transfer some of Condor's business to Progressive in an effort to halt Condor's worsening financial position. Grech, plant manager at Progressive, visited Condor in late January 1989 to assess the plant's operations and was consulted about the possible integration of both facilities. It should be noted that in March 1989, Grech also assumed responsibility for operations at Condor although at some point Condor did have an on-site "plant manager" who reported to Grech. At Progressive, a variety of processes were performed, including extrusion laminations (cast film extruder/laminator), offset printing, gravure printing and specialized bag making. While Progressive could absorb some of Condor's operations, the reverse was not possible The only function at Condor which could not be performed at Progressive was blown film extrusion. Operations transferred to Progressive included some printing, laminating and slitting. It was not practical to transfer all work. The blown film extrusion remained at Condor as did bag making and some printing as Progressive did not have sufficient excess capacity to absorb all the printing. The products produced at Progressive in connection with the business transferred from Condor retained the Condor name to ensure continuity in the market place. No machinery was transferred to Progressive from Condor because that equipment was old and inefficient. Some raw materials were transferred and, indeed, there was some movement of materials back and forth between the two plants. There is no conclusive evidence that the transfer of work resulted in any significant increases in overtime or additional shifts at Progressive.

19. It was Cooke, group president, who made the ultimate decision to transfer work from Condor to Progressive. The move would result in substantial layoffs at Condor. Condor selected March 31, 1989 as the effective date for the transfer and layoffs. Neither Grech nor Hutcheson were involved in that decision. Nor were Anderson or Finnegan involved in any way in the partial closure of Condor. As mentioned earlier, Anderson had lost responsibility for Condor in January 1988 and was asked to leave Innopac entirely in March 1989. Finnegan had never had any operating responsibility at Condor and was himself asked to leave Innopac in May or June 1989. Of the salaried staff, all except the customer service and sales and one supervisor were terminated. The customer service and sales staff were retained to ensure continuity of markets but were transferred

to Progressive to reduce administrative overheads. Of the bargaining unit employees, approximately 22 persons were to be laid-off. This represented virtually one-half of the bargaining unit. There is no suggestion that Condor management acted other than in compliance with the collective agreement in selecting the employees for lay-off. Further, since March 31, some work was transferred back to Condor and employees recalled on a temporary basis, again, in accordance with the collective agreement.

20. Shortly before March 31, Hutcheson telephoned D. Gray, union president, informed him of the impending layoff and requested his presence at a meeting with management scheduled for Friday, March 31 at 10:00 in the morning. That meeting lasted between one and two hours. The company indicated that certain operations at Condor would be transferred to Progressive and showed Gray and his committee the type of letters which were to be given to the bargaining unit employees later that day. The contents of the letters will be examined in more detail later (see paragraph 42 infra for text of letters) but it is sufficient to note here that two options were presented to employees, including an "enhanced" package which would require the employee to sign a release. The joint meeting was adjourned for some time so that the union could caucus. After the break, Gray informed Hutcheson that the union would be advising its members not to sign the letter. In Gray's view, the "enhanced" option constituted direct bargaining by the company with bargaining unit employees in violation of the *Labour Relations Act* and, further, improperly required employees to waive their collective bargaining rights, including recall rights. Gray mentioned that the union would pursue matters at the Labour Relations Board. It should be noted, in passing, that the salaried employees who were terminated also were to select between two options, one of which was an enhanced package but required a release and confidentiality agreement.

21. At 2:30 in the afternoon on March 31, 1989, the company announced the termination and partial transfer of Condor business to Progressive to the salaried staff. At 3:00 p.m., company officials met with the bargaining unit employees. Gray was present on behalf of the union. That meeting lasted until approximately 4:30 p.m. to answer employees' question. Some employees were informed they would be asked to continue employment during a transitional "work out" period; they received separate letters detailing the conditions of the work out. The letters which the laid-off employees would receive were reviewed and the various benefits explained. Hutcheson pointed out to employees that they should see their union representatives on site (Gray and the union stewards) to discuss the terminations and the severance package before making their decision. Hutcheson also mentioned that there was an outplacement service for employees scheduled for Monday, April 3 to assist employees with respect to counselling, resume writing, information regarding UIC benefits, etc. The union representatives were permitted to address the employees and announced that a union meeting was to be held on Sunday (April 2, 1989) and advised employees not to sign anything at least until after that meeting. The union meeting on that Sunday lasted roughly two hours.

22. The outplacement seminar was held on Tuesday. Gray attended. Also present was M. Beauvais, manager of employee relations for Innopac. Her responsibilities included pensions, benefits, administration, and ensuring compliance with various statutory obligations. Beauvais reviewed topics such as, UIC benefits, resume writing. Not long afterward, Beauvais was contacted by T. Lawton, a bargaining unit employee who had been offered a workout period. Lawton asked if he could discuss the contents of the letter with his wife; Beauvais replied in the affirmative. Lawton also asked if he could negotiate a lower wage with the company so he could keep his job. Beauvais replied that, as Lawton was a bargaining unit member, the union negotiated on his behalf and he could not negotiate with the company; moreover, Beauvais added that she had no authority to negotiate at all on behalf of the company, her function was to provide information on benefits, etc.

23. At the 10:30 meeting on March 31, Gray had asked Hutcheson if Condor employees would be transferred to Progressive. Hutcheson replied that it was his understanding there were no positions then available at Progressive. No instructions were given to or by Cooke, Hutcheson, Reid, Ranahan or Grech not to hire Condor employees at Progressive. [Ranahan was effectively general manager at Progressive until his departure in late 1989.] The various companies of Innopac operated as self-contained units. Cooke indicated he had no intention of interfering with Progressive's traditional hiring policy as it had proved so successful. Cooke did state to management at Progressive that skilled employees from Condor should be considered for Progressive positions if needed. Several Condor employees did apply at Progressive. At least four were interviewed by the foreman or department head. While Grech would be kept informed of hirings, in particular of experienced operators, the decision itself would be made by the department head and/or foreman. No Condor employees laid-off from the bargaining unit were hired at Progressive.

24. Subsequent to the purchase of Progressive, the union did attempt to organize the employees at Progressive but without success. Progressive management was instructed not to get involved in any way with the union efforts even if current Progressive employees became anxious, other than to indicate in a general way that it was "business as usual" at the plant.

ARGUMENT

25. The Board next sets out the able and thorough submissions of counsel in a highly abbreviated form.

26. With respect to the section 1(4) application, counsel for the respondent reiterated the company's position that a section 1(4) declaration should issue but asserted that there was no jurisprudential support for the relief claimed by the union, namely, the extending of the scope clause of the Condor collective agreement to encompass the Progressive operations. Counsel reviewed, in some detail, the allegations in the section 89 complaint, the testimony of the witnesses and the documentary material. It was argued that the evidence of Lawton, Bednar and Ali, witnesses called by the union, should be rejected outright as not credible; the testimony of Gray was not inconsistent with that of Hutcheson with respect to the various events. Counsel argued the testimony of a wide range of company witnesses established that the purchase of Progressive was bona fide and untainted by anti-union animus. Likewise without taint, were the various other decisions including transferring some Condor operations to Progressive, the bonus to Progressive employees paid by Reid, the wage increases at Progressive and the failure to hire former Condor employees at Progressive. Counsel contended the evidence indicated that Innopac and its officers were not anti-union and the various conversations alleged in the complaint were unsubstantiated. Nor, it was argued, could the options to the employees in the termination letters be characterized as bargaining directly with the persons in the circumstances, particularly given the union's involvement prior to the announcement, presence at the announcement meeting and outplacement meetings, etc. In reply, counsel rejected any adverse inference from the failure to call Reid given that Fabi, the President and CEO, had testified, as had other key players within their respective roles. Counsel sought to distinguish those cases referred to by union counsel. Finally, counsel stressed that to grant the union's requested relief and extend the geographic scope clause of the Condor collective agreement would be to sweep over 100 Progressive employees into the bargaining unit (whereas the Condor unit had originally held only about 45) and entirely circumvent the usual certification process. Cases cited in support included: *City of Toronto Non-Profit Housing Corporation*, [1982] OLRB Rep. Feb. 280; *Dominion Stores Limited*, [1979] OLRB Rep. June 506; *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526; *Mountainview Dairy Ltd.*, [1967] OLRB Rep. Feb. 911.

27. Counsel for the union stressed that the onus lay on the company to disprove the allega-

tions. Counsel, as well, reviewed the testimony of the witnesses and the documentary material in support of his assertion that Fabi, in particular, was not credible in his account of the Progressive purchase and his denial of any anti-union animus in his decision-making. Counsel contended the "anti-union animus" need not extend throughout the entire organization (to Grech and Hutcheson, for example) to support a finding that the various decisions to purchase Progressive, close Condor and not transfer Condor employees were tainted. Counsel stressed that the allegations had been substantiated in respect of Fabi, Anderson, Finnegan and perhaps Beauvais. It was argued those conclusions did not depend on the acceptance of the testimony of the union witnesses in its entirety. It was argued that the enhanced package did amount to direct bargaining with employees and the company's direction to "see the union" was insufficient to counteract the impropriety. Counsel submitted that the partial closure and then recall of some Condor employees constituted an illegal lockout. The jurisprudence was reviewed in support of the various remedies sought, including the extension of the collective agreement scope clause as the only relief which could effectively respond to the various unfair labour practices. Cases referred to in support were: *Sunnycrest Nursing Homes Limited*, [1981] OLRB Rep. Feb. 261; *Toronto College Street Centre Limited*, [1986] OLRB Rep. June 913; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931; *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401; *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745; *Sunnylea Foods Limited*, [1981] OLRB Rep. Nov. 1640; *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261; *Guaranteed Insulation '77 Limited*, [1981] OLRB Rep. Oct. 1394; *Re Tandy Electronics Ltd. and United Steelworkers of America et al.* (1980), 30 O.R. (2d) 29 (Ont. Div. Ct.); *Radio Shack*, [1979] OLRB Rep. Dec. 1220.

DECISION

28. The Board intends to deal firstly with the section 89 complaint and, thereafter, with the section 1(4) application. For convenience, the Board has grouped the unfair labour practice allegations under four headings: the purchase of Progressive; the March 31, 1989 events and layoff letters; the transfer of work from Condor; the "conversations and remarks". In so organizing the material, the Board recognizes that the groupings are somewhat artificial and the "compartments" are not "watertight". Moreover, the Board has examined the cumulative effect of the various events.

29. Some preliminary remarks are useful before proceeding with the detailed analysis just outlined. Credibility is central to this case. The Board heard from a number of respondent witnesses who hold various management positions and participated in varying degrees in the decisions and events which have been impugned by the union. Included among those witnesses was M. Fabi, the President and CEO of Innopac, who was subject to thorough cross-examination. Without unduly repeating its comments in paragraph 5 above, the Board has carefully considered the credibility of the respondent's witnesses, and Fabi in particular, in the context of the testimony of other witnesses but, also, critically, in the context of the extensive documentary material and what is reasonably probable in the circumstances. The Board has recognized that employers are unlikely to voluntarily admit to anti-union motivation and, thus, the Board, of necessity, must draw inferences. There is also no doubt that the improper motivation need not be the sole or even predominant reason for the employer's conduct. The jurisprudence is replete with reiterations of these principles: *The Barrie Examiner*, *supra*; *Sunnycrest Nursing Homes Limited*, supra; *Kennedy Lodge*, *supra*; *Radio Shack*, *supra*; *Third Dimension Manufacturing*, *supra*; *Sunnylea Foods*, *supra*. The test of anti-union motivation is rigorous and the conclusion in each case is founded on an examination of all the circumstances.

30. Nonetheless, the Board is satisfied that the respondent's witnesses were candid and

forthright in their explanations and their evidence is to be accepted wherever that contradicts the testimony of the union's witnesses. In this regard, however, the Board notes that there were no material differences between the testimony of Gray, the local union president and Hutcheson, the corporate director of industrial relations.

THE PURCHASE OF PROGRESSIVE

31. Included under this heading is the purchase itself plus the wage increase and bonuses paid at Progressive.

32. Progressive can only be characaterized as a "prized catch" for Innopac. The company owns the facility and land. The business had experienced dramatic growth from 25,000 square feet to 100,000 square feet in ten years. Its workforce of 125 was productive; its machinery modern to state of the art. Progressive's product line (plain and printed film, specialty bag products, etc.) primarily for the snack food industry complemented the existing businesses at Innopac and expanded their product lines so as to bring greater balance to the Innopac portfolio and lessen its dependence on the foam products segment. In short, Progressive was an ideal candidate.

33. The union's argument for anti-union motive focused on an excerpt from Exhibit 23, the presentation to the Innopac board of directors by Fabi when he sought approval of the purchase. That presentation document is substantial, covering matters such as: executive overview; impact on earnings per share; description of transaction; target company (background, products, sales and customers, employees, facilities, raw materials); plans for integration (summary, flexible strategy, time frame); financial analysis (Progressive historical financials, valuation summary, summary of impacts, adjustments/synergy); appendices (Progressive projections, Condor projections, adjustments/synergy, combined projections, valuation-cash flow details). The excerpt, under "employees" reads:

> The company currently has 125 employees, of which 30 are salaried. All employees are non-union, many of which have been with the company for up to 27 years.
>
> It is expected that Progressive will remain non-unionized post acquisition as it is planned to offer only a very limited number of direct employees of Condor positions with Progressive, and the Progressive plant does not come under the scope of the union chapter at Condor.

34. The Board is satisfied that the excerpt is *descriptive* and not *proscriptive*. That Progressive does not fall within the scope clause of the Condor collective agreement is undisputed. Progressive's traditional hiring policy (which will also be dealt with *infra*) was to bring in employees at entry level positions, provide training and promote them through the ranks to the experienced operator positions as vacancies arose. The reference to the Condor employees was to the sales and customer service staff (outside the bargaining unit) who were to be transferred to Progressive to maintain continuity with the customer base. That Progressive would remain non-unionized was the opinion of Reid, Progressive's owner.

35. The assessment that the excerpt is descriptive is further supported by references in the purchase agreement wherein the vendor must stipulate as to its obligations to a union (if any) and their knowledge of any current organizing activity and the status of relations between the company and existing employees. This type of reference also appears in standard documentation for other bids by Innopac to purchase other companies (e.g., Graphic Packaging, Continental Extrusion), and the standard format for annual reports by American companies to the Securities and Exchange Commission.

36. Of critical import, as well, is Innopac's conduct in seeking to expand its current holdings

during the period contiguous to this complaint. In addition to the fact that some 11 of 23 units of Innopac are unionized, Innopac was an unsuccessful bidder (in a sealed bid process) for Graphic Packaging wherein all hourly rated employees were represented by unions and Innopac recently purchased Continental Extrusion whose employees in the New York location are represented by the ILG Local 132-98.

37. Thus, in the Board's view, the purchase of Progressive was solely for *bona fide* business reasons and not, in any way, an attempt by Innopac to rid itself of the union at Condor.

38. The Board need deal only briefly with the wage increases paid to Progressive employees in March and October 1988 and March-April 1989. The testimony of Grech, Progressive plant manager, whose credibility was not disputed by the union and whose evidence the Board accepts, was that he recommended the increases, primarily to the starting level rates, in order to keep Progressive rates competitive and to attract employees to entry level positions. An informal wage survey predated the earlier increases; a more formal wage survey was prepared by Bewes, the personnel manager of Progressive, in early 1989 leading to the increases granted in March and April 1989. Those surveyed to ascertain the going wage rates for entry level (labourer, trainee, helper) positions consisted of Progressive's competitors in the industry and local wage rates for Aurora. It is accurate to note that the March-April 1989 increases were coincident with the layoffs at Condor. However, the evidence clearly establishes that the increases in that period were part of a pattern of wages adjustments to the lower end of the scale to ensure Progressive remained competitive and would attract good employees at the entry level. The Board notes that, even after those adjustments, generally the wage rates at Condor were comparable to those at Progressive.

39. The Board also need only deal briefly with the question of the bonuses paid to Progressive employees. Those bonuses were announced by Reid on December 14, 1988 in conjunction with the notice to employees of the impending sale to Innopac. The bonuses, which were substantial and calculated according to length of service at Progressive, were paid by Reid out of the proceeds of the sale. Since Reid wanted to share the proceeds of the sale with his employees, most of whom were long service, he made the payment of bonuses a condition of the sale; Innopac agreed provided the monies came from Reid personally and not from the Progressive operation. As noted, Progressive was a privately held company with Reid as owner. The bonuses were neither approved by Innopac nor was Innopac liable for payment. As Fabi characterized the matter, "it was his (Reid's) money". There is nothing to suggest involvement by Innopac in the bonus payments or anti-union motive by Reid in so doing.

MARCH 31, 1989 EVENTS AND LAYOFF LETTERS

40. The union was informed of the impending layoffs by Hutcheson one or two days before Friday, March 31 and was invited to a meeting with the company at 10:30 a.m. on that day. At that time, Hutcheson discussed the layoffs, the intended transfer of part of the Condor operations to Progressive and showed the union representatives the format of the layoff letters. The meeting was adjourned to permit the union to caucus; on their return, the union president took the position that the union would be advising its members not to sign the letter and that the enhanced severance package was regarded as bargaining directly with employees contrary to the Act.

41. The union attended the 3:00 p.m. meeting later that day at which the company announced the layoffs and options open to employees. The company expressly told the employees to consult with their union before making their decision. The union was permitted to address the employees and directed them not to sign at least until after the union meeting on the Sunday. The union at that later meeting advised its members not to sign the letters at all. Finally, it should be

noted that the union also attended the Monday meeting at the Condor plant where Beauvais reviewed various topics as UIC benefits, resume writing, etc.

42. It is useful to set out extracts from the general announcement, the form of letter given to those laid off immediately (referred to as "lay-off letter") and the form of letter given to employees asked to continue during a "workout period" ("workout letter").

GENERAL ANNOUNCEMENT

TO: All Hourly Employees:

You will recall that a very stringent cost-improvement program was implemented at Condor Laminations with the expectation that the company would recover by year end. Unfortunately, that has not occurred and the economic outlook continues to be uncertain.

Therefore, it is necessary at this time to take a most difficult step and reduce the number of employees. The reduction in force will take place immediately.

• • •

Employees on layoff will receive severance pay according to the provisions as set forth in the collective agreement or relevant legislation.

An enhanced severance schedule providing reference letters, assistance in preparing resumes and job counselling may be available to hourly employees; *please see your Union representative* and Employee Relations representative for details.

[emphasis added]

LAYOFF LETTER

The following termination package options are available for your selection:

Option (a) The company will provide assistance under the Job Search program for a specified period of time. The company may undertake to provide this service using in-house expertise, or at the company's option, may have an outside agency provide career counselling assistance.

> Please indicate to your Supervisor/Manager immediately if you wish to take advantage of this offer. It is important to sign up for the program immediately to be eligible to attend the Job Search Workshops.

Option (b) An enhanced termination package may be available providing reference letters, individual assistance in preparing resume and job search counselling to hourly employees, *please see your Union representative* and Employee Relations representative for details.

[emphasis added]

> It is a condition of your receiving a letter of reference and/or other valuable consideration that you agree in full to the following covenants:
>
> > you will execute a release of all claims releasing the company from any and all grievances, claims, actions or causes of action against the company, its officers, directors, servants and agents relating to your employment or termination of employment.
>
> Please signify your selection of termination options below by initialling either option (a) or option (b). Please sign two copies of this letter in the

space provided below and return the duplicate copy not later than *Monday, April 3, 1989 by 10:00 a.m.*, to the Employee Relations representative on site at Condor Laminations.

Upon receipt of your selection choice of termination option (b), we will arrange for the legal Release of Claim documentation to be signed and the issuance to you of your letter of reference and that an individualized Job Search program be designed for you.

Regardless of the termination option that you choose, the company will pay you any statutorily required pay in lieu of notice and/or any severance owed by virtue of specific provisions within the collective agreement, plus any vacation pay owing less any statutorily required deductions.

WORKOUT LETTER

Your expertise and ongoing cooperation is crucial to the reorganization of this business. We require your assistance on an interim basis as follows:

(1) During the period April 3, 1989 to May 26, 1989, you are to work on projects as assigned. Vacation time owing will not be available to you within the "workout period" as described above, vacation monies owing will be distributed according to the provision selections within this agreement. Your reporting function during this period will be to Don Habibullah of Condor Laminations.

(2) Only with the direct written approval from the company President or his designate may you terminate prior to May 26, 1989.

If you elect to do so without approval, or are discharged for cause, severance monies and benefits will be forfeited.

(3) You will continue to receive your regular pay and benefit provisions throughout the "workout period" subject to your filfulling in both practice and spirit the covenants and stipulations within this agreement.

(4) May 26, 1989, at the close of the business day, your employment termination becomes effective and final, subject to the provisions stated above.

In consideration for satisfactorily fulfilling your obligations under the "workout" period, you will be offered the following severance package payable upon completion of the assignment.

lump sum payment equivalent to the cost of your average wage (based on the preceding three month average) for the period May 26, 1989 through July 21, 1989 less required withholding.

The company wishes to notify you that specified benefits coverage under the company benefit plan will remain in effect for a duration equivalent to your "workout" period. Your coverage under the company's wage disability plan(s) has been terminated effective immediately.

Any amount of employee contributions which you would normally pay to maintain benefit coverage will be deducted from any payments to be made to you by the company.

• • •

An enhanced termination package will be available providing reference letters, individual assistance in preparing resumes and personal job search counselling. Upon completion of your "workout" period, the company will arrange for these services to be rendered. Please see your Union representative and Employee Relations representative for details.

It is a condition of your receiving a letter of reference and/or other valuable consideration that you agree in full to the following convenants:

(1) you will execute a release of all claims releasing the company from any and all grievances, claims, actions or causes of action against the company, its officers, directors, servants and agents relating to your employment or termination of employment;

(2) you agree, covenant and warrant that you will not disclose or cause to be disclosed any information or advice which may or can be detrimental or considered detrimental to the company or its shareholders, directors, officers or employees.

Specifically, you agree that you will not divulge any trade secrets or secret information respecting any process, formula, skill, method of manufacture, method of doing business, customer lists, etc., of the company. Any breach of this agreement would automatically cause any payments and/or obligations of the company to cease and be null and void.

(3) you agree you will not directly or indirectly disclose any of the terms of this severance package to any other person, *other than your immediate family, legal, union and/or financial advisors or such persons or agents as required by law*. Breach of this term would automatically cause any payments and/or obligations of the company to cease and be null and void. The following termination package options are available for your selection:

[emphasis added]

Please signify your acceptance by signing two copies of this letter in the space provided and return the duplicate copy not later than *April 3, 1989 at 10:00 a.m.* to the Employee Relations representative on site.

• • •

Regardless whether you choose to accept or not accept the company "workout offer" the company will pay you any statutorily required pay in lieu of notice and/or, any severance owed by virtue of specific provisions within the collective agreement, plus any vacation pay owing less any statutorily required deductions.

43. Both the layoff letter and the workout letter had the following "release" attached:

I, , understand fully that, by accepting severance payments pursuant to section 40a(1) of the *Employment Standards Act*, I am fully and finally renouncing any recall rights which I might have pursuant to the Collective Agreement between Condor Laminations and the Toronto Typographical Union, Local 91, dated the 5th day of August, 1986.

This waiver and abandonment of such recall rights is made pursuant to section 40a(8) of the *Employment Standards Act*.

44. Counsel for the union characterized the above as bargaining in bad faith, bargaining directly with employees about terms and conditions of employment, interference with the administration of the union and its bargaining rights, intimidation and coercion and interference with employees' rights. Counsel for the respondent asserted that the company was not circumventing the union as bargaining agent, that notice to employees under the *Employment Standards Act* must be on an individual basis and that the "release" is the consequence of the *Employment Standards Act* provisions, not a company "machination". Counsel for the union acknowledged that, under the *Employment Standards Act*, notice must be given directly to each employee but did not otherwise comment on the effect of that act as a release of claims.

45. It is appropriate to begin by noting that the collective agreement at Condor is effective

from August 5, 1986 to September 19, 1989. While the Board has imposed a duty to disclose impending layoffs and closure decisions during bargaining to permit a full and rational discussion (see generally, *Westinghouse*, *supra*; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1414, [1983] OLRB Rep. Dec. 1995; *Sunnycrest Nursing Homes*, *supra*), there is no obligation to bargain about such matters mid-term in a collective agreement apart from any specific obligation in the collective agreement itself. There is no such obligation in the collective agreement at Condor.

46. It is also clear that an employer is permitted, in so far as the *Labour Relations Act* is concerned and subject to any collective agreement provisions, to close his operations in whole or in part provided such decision is occasioned by business considerations and not tainted by anti-union motivation. For reasons discussed later, the Board finds that there was no such improper motivation in the decision to transfer part of Condor's operations to Progressive in the resulting layoff. Also as noted *infra*, the Board is not here commenting on the propriety of that decision in the context of the collective agreement provision in Article 8.03 (contracting out) but is just dealing with the unfair labour practice aspects.

47. Counsel for the union conceded that the individual employees must receive layoff notices to comply with the *Employment Standards Act*. There is no suggestion that the severance pay does not comply with the statutory requirements. The Condor collective agreement is silent as to the question of severance entitlement. Thus, pursuant to the management rights clause, the company is free to offer an "enhanced" severance package (i.e., beyond the minimum statutorily required), again, provided its motives for so doing are, as the Board finds, free from anti-union animus. While the *Employment Standards Act* in section 40(a)(15) provides that a trade union entitled to represent employee *may* enter into an agreement with the employer which includes a settlement of all severance pay claims, there is no obligation to do so and the company is not culpable, in the circumstances, for not bargaining with the union given the silence of the collective agreement on the issue.

48. The "enhanced option" in the layoff letter consists of the willingness of the company to provide reference letters and individual assistance in preparing resumes and job search counselling. Those employees on "workout" were to receive a lump sum equivalent to the worker's average wage (based on the preceding three month average) for the period May 26, 1989 (the final workout day) through July 21, 1989 less required deductions. Reference letters, individual assistance in preparing resumes and personal job search counselling were also to be provided. Both the layoff and workout letters specified that, regardless of the employee's choice as to the enhanced package, the appropriate severance payments would be made.

49. Somewhat more problematic is the propriety of the "release". Both the layoff and workout letters state that: "It is a condition of your receiving a letter of reference and/or other valuable consideration that you agree in full to the following covenants: you will execute a release of all claims releasing the company from any and all grievance, claims, actions or causes of action against the company, its officers, directors, servants and agents relating to your employment or termination of employment". The workout letter goes on to prohibit disclosure of trade secrets and other information confidential or detrimental to the company and to prohibit disclosure of the of terms of the severance package other than to "immediate family, legal, union and/or financial advisors or such persons or agents as required by law". There was also a formal release form attached to both letters to be signed by the employee.

50. Counsel for the respondent asserted that the formal release merely expressed the effect

of the *Employment Standards Act* in such circumstances. Counsel for the union did not comment on this aspect. Sections 40a(7) and (8) of the *Employment Standards Act* read:

> (7) Where an employee who is entitled to severance pay under this section has a right to be recalled for employment under the terms and conditions of employment, the employee may elect to be paid the severance pay forthwith or may elect to maintain the right to be recalled.
>
> (8) Where the employee elects under subsection (7) to be paid the severance pay forthwith, the employee shall be deemed to have abandoned the right to be recalled.

Given the wording of the statute, the Board is satisfied that the formal release does not constitute bargaining with employees in contravention of the *Labour Relations Act*. It is *Employment Standards Act* which deems the recall rights to be waived if the employee elects to accept the severance payment forthwith.

51. The release in respect of the enhanced package goes beyond recall rights to include "all grievances, claims, actions or causes of action ... relating to ... employment or termination of employment". The Board is satisfied, however, that the company was not "bargaining" with its employees over terms and conditions of employment. The company was not required by the Act to bargain with the union over the layoffs. The collective agreement was silent on the issue of severance entitlement so the matter fell within the management rights clause. Thus, the collective agreement provisions did not require the company to bargain with the union over the severance issue nor to involve the union in its deliberations in this matter. Of critical importance are several other factors. It must be remembered that the company met with the union prior to the general announcement, informed them of the layoffs and showed the union representatives the format of the letters. The letters *expressly* refer the employees to their union representatives for details regarding the enhanced severance package. This message was expressly repeated at the 3:00 p.m. meeting where the union was in attendance and addressed the employees. At that time, the union instructed employees not to sign the letter at least until the union meeting on the following Sunday. The company officials did not comment on that statement let alone seek to dissuade employees from that course of conduct. The union also attended the session on Monday regarding resume writing, etc.

52. In all of these circumstances, it is difficult to depict the company as "interfering" with the union's representational rights or doing an "end-run" around the exclusive bargaining agent. The employees were in no way pressured to choose the enhanced option and were directed to contact their bargaining agent before making their decision. Were there a finding of anti-union animus in the various decisions by the company affecting Condor employees in the bargaining unit or had the company sought to exclude the union from involvement in the layoff announcement, the Board might have reached a different conclusion. Having considered all the factors, however, the Board finds that the company did not act improperly in the manner in which the employees were notified of layoff, either with or without a workout period. There was no unlawful interference with statutory rights. As stated above, there was no allegation that the specific selection of employees for layoff contravened the collective agreement.

TRANSFER OF WORK TO PROGRESSIVE FROM CONDOR

53. Included in this category is both the transfer of work from Condor to Progressive and the fact that no bargaining unit employees at Condor were hired at Progressive.

54. The Board need not repeat its earlier comments about the attractiveness of Progressive and the *bona fides* of that purchase. That acquisition did offer Innopac an opportunity to rational-

ize operations at Condor by moving some of the functions to Progressive. Condor had been losing money for some time, $1 1/2 million in 1988 and was on track to lose $2 l/2 million in 1989. The meat and cheese market itself had been in decline for several years as consumers shifted away from those products. Not surprisingly, the market for packaging for such products declined as well. Condor, with its obsolete equipment, was not well positioned to compete with its aggressive rivals. Some of Condor's work could be absorbed by Progressive, other aspects (blown film extrusion) could not. That transfer did not result in an increase in employment opportunities at Progressive: the plant population figures are virtually static for the months of January to May 1989. That is, Progressive's excess capacity merely absorbed the Condor work. In the Board's view, the transfer of part of Condor's operations (some printing, laminating and slitting) was motivated exclusively by business considerations and did not, even in part, result from a desire to escape collective bargaining obligations. This conclusion is reinforced by the fact that no machinery was transferred to Progressive and, when all the work which initially was transferred could no longer be accommodated at Progressive, that work was returned to Condor and the needed employees recalled. The transfer of work cannot be properly be characterized as a lockout as that term is defined in the Act. The employer was not seeking to compel or induce the workers to refrain from exercising their rights or privileges or to agree to changes in their working conditions. The Board notes again that its finding that there was no improper motivation in the transfer and, thus, no unfair labour practice does not address the issue as to whether that transfer constituted a violation of Article 8.03 of the collective agreement dealing with the contracting out of work. That question is for an arbitrator, not the Board, to determine.

55. As noted earlier, no laid-off employees at Condor were hired at Progressive. This situation, of itself, gives rise to a natural suspicion that the Condor employees were not hired because of their union membership and requires a most careful scrutiny of the circumstances.

56. The Board has already mentioned Progressive's traditional hiring policy of accepting new employees into entry level positions and having them progress through the ranks. This finding was based on Grech's testimony and his credibility was not seriously challenged by the union. The hiring policy is also substantiated in the documentary evidence. Of the 34 persons hired in the period January to May 1989 inclusive, to replace turnover, all but one was an entry level job. That exception was a maintenance mechanic hired in May. The applications tendered in evidence as representative of the Condor employees who sought employment at Progressive indicate that those workers were seeking positions as experienced operators with a wage rate commensurate with those experience levels and well above the entry level rates at Progressive. There was no evidence before the Board that any Condor employees were interested in applying for entry level positions but had been refused employment. Likewise, there was no evidence that any Condor employee had applied for the position of maintenance mechanic.

57. Progressive did advertise for an experienced extruder operator in May 1989. The evidence establishes that this position was new. The company was putting into operation a recently installed state of the art extruder/laminator. Only one other company in Ontario had that piece of equipment. Even persons experienced as extruder/laminators in similar operations needed training on this equipment. In this regard, the Board notes that the extrusion process at Condor was entirely different from that at Progressive. The skills of experienced extruder/laminators at Condor were not readily transferable to the Progressive operation and certainly not to the machine in question. Progressive attempted to hire an experienced operator from its competitors but was unsuccessful; an internal candidate was ultimately hired.

58. On balance, then, the Board concludes that the failure of Progressive to hire Condor employees who were laid-off did not contravene the Act.

CONVERSATIONS AND REMARKS

59. The union alleged that a number of the respondent's management team had made remarks which were depicted as "anti-union", including Fabi, Finnegan, Anderson and Beauvais. The union called various witnesses in attempting to prove these allegations, namely, Bednar, Ali and Lawton. Union counsel asserted that such remarks revealed the respondent's true attitude about unions and, thus, formed an anti-union foundation for the company's decisions regarding the transfer of Progressive, transfer of work and layoff at Condor.

60. The Board intends to comment relatively briefly about each alleged conversation.

61. Lawton testified that Beauvais, manager of employee relations at Innopac, told him that no one from Condor would be hired at Progressive in order to prevent union activity at the latter plant and that she would deny ever having said that if Lawton told anyone. As well, Lawton testified that Beauvais instructed him not to discuss the workout letter with his wife or a lawyer. Beauvais' version is that she assured Lawton he could discuss the letter with his wife and lawyer and that, in response to Lawton's request to negotiate a lower wage rate in order to keep his job at Condor, she responded that, as he was a bargaining unit member, the union negotiated on his behalf, he could not negotiate directly with the company and she had no authority to negotiate with anyone. The Board has earlier commented that it regards Beauvais as a forthright witness. Moreover, Lawton's version would have the Board believe that, on a first meeting with Beauvais, she would "confide" in him as to the "real" reason Condor employees would not be hired at Progressive and direct him not to discuss the workout letter with his wife or a lawyer when the letter *expressly* permitted such contact. Lawton's version is entirely implausible and is rejected.

62. Ali was a senior foreman at Condor who was terminated when his position was abolished in September 1988. He testified that, in June 1988, Finnegan said that Innopac was looking for a new facility to replace the Condor plant "east, west, north or south...where there is no fucking union and where Mike Tyson will run the place". Ali also testified that, in March or April 1988, Anderson stated that the union (at Condor) was the main cause of loss of product and absenteeism. Neither Finnegan nor Anderson testified as neither was still employed at Innopac. Finnegan, who had been a director or vice-president of technical process development, worked out of the Minnesota office for Strout Plastics although he travelled a great deal. He was asked to leave in May or June 1989. Anderson had been group president (flexible packaging and corrugated plastics); his responsibilities had included Strout Plastics and Condor until he was relieved of his Condor obligations in January 1988. Anderson was asked to leave Innopac in March 1989. In the circumstances, it is not unexpected that the respondent would call neither Anderson nor Finnegan even if it was able to locate one or both of them.

63. The Board, then, is left with the testimony of Ali - himself a management person who was terminated by Innopac and, hence, whose testimony must be carefully weighed. It is important to note that Finnegan never had any operating responsibilities for Condor and, at the time of the alleged remarks by Anderson, Anderson had already had his responsibilities for Condor removed. As well, the evidence indicates that following negotiations of the collective agreement in August 1986, relations with the union at Condor were positive. The financial difficulties of the company were related to its obsolete equipment, declining market and keen competition, not the union or the collective agreement. Finnegan's alleged comment must also be placed in the context of the presence of unions at 11 of the 23 Innopac's units, the recent acquisition of Continental Extrusion (a unionized facility in New York) and the heavy investment of new equipment at Montebello. Specifically, in 1988, a new plastic tube line was put into operation at the Montebello plant and, in

1989, a high speed metal tube line was planned. Montebello employees were represented by the United Steelworkers of America.

64. On balance, the Board does not accept the testimony of Ali as an accurate account of the alleged conversions. Accordingly, these allegations are also rejected.

65. Finally, the Board deals with the testimony of Bednar to the effect that he was told by Fabi in January 1987 at a meeting in Florida that "if he (Bednar) had been in charge of an American operation which had been certified, he would have been fired". Fabi vehemently denied the allegation and the Board regards Fabi to be a candid witness. Bednar, in contrast, was self-serving in his explanation of events and implausible in his answers. Bednar acknowledged that he regarded the union initially as a hindrance to operations and blamed the union for a decline in product quality and output in the summer of 1986. It was *Bednar* who authored the historical review section of the Condor strategic plan and characterized the union certification as "negative", not Fabi or Innopac. That Bednar had an "axe to grind" against Innopac and Fabi is evident: Bednar was abruptly demoted from Vice-President/General Manager at Condor in September 1987; his demotion letter made it clear his performance was under review; in February 1988, Bednar was fired. He subsequently sued for wrongful dismissal. Fabi testified that Innopac tried to turn Condor around through a management shake-up since the other factors (declining market for meat and cheese) were outside Innopac's control and the technological investment was too costly. Bednar was found wanting and ousted. In Fabi's view, the plastics packaging industry is market and technology driven, the presence of a union is not relevant to a company's success and that factor would not be accepted as an excuse for poor performance by management. The Board considers that a candid statement of Fabi's approach. In short, the Board utterly rejects Bednar's testimony and the allegations therein.

SUMMARY OF THE SECTION 89 COMPLAINT

66. The Board, for the reasons given, has not found the respondent to have committed any of the unfair labour practices alleged by the union. In so doing, the Board has not simply considered each allegation of wrongdoing or improper motive in isolation. Rather, the Board has been sensitive to the potential cumulative effect. That is, events which separately appear to be justified, when taken together may be suggestive of anti-union motivation. The Board is satisfied that the explanations proffered were the *real* explanations and the *only* explanations for the impugned conduct both when viewed separately and when taken together. In the instant case, the "broad picture" is of the respondent (Innopac) operating a number of companies with 11 of 23 units represented by various unions including the United Steelworkers of America, the Teamsters, the Canadian Paperworkers, The Toronto Typographical Union, and the ILG Local 132-98. Some companies were unionized at the time of purchase; some were certified subsequently. Not long prior to the acquisition of Progressive, Continental Extrusion, with a unionized facility in New York, was purchased. Labour relations at the unionized locations were good. This is not an employer bent on "ridding" itself of a "troublesome" union at Condor. The facts, viewed objectively, simply do not support such an inference.

67. The Board has not regarded it as necessary to refer extensively to the Board jurisprudence including those cases referred to by counsel. The Board agrees with the analyses in those cases and the principles enunciated therein. In the instant case, the Board has concluded the respondent did not commit any unfair labour practices in its decisions to purchase Progressive, transfer work, lay off Condor employees, and pay bonuses and wage increases to Progressive employees. Thus, this case has turned on the Board's factual findings, and does not involve any deviation from the Board's existing jurisprudence.

68. The Board's reasoning has focused on the conduct cited in the allegations as a more useful means of proceeding rather than proceeding *seriatim* through the sections alleged to have been violated, namely, sections 3, 15, 64, 66, 67, 70 and 72. At specific points, some sections have been mentioned. In other respects, the Board has dealt with allegations on a more comprehensive basis by finding that the respondent's decisions and actions were not motivated by anti-union animus.

69. To summarize, the Board finds that the respondent has not breached any of the aforementioned sections of the Act, and the unfair labour practice complaint is dismissed.

SECTION 1(4) APPLICATION

70. Counsel for the respondent acknowledged that the requisite statutory criteria for a section 1(4) declaration were satisfied and consented to a declaration. The union argued, though, that the Board should go further and extend the geographic scope clause of the Condor collective agreement, which encompassed the Municipality of Metropolitan Toronto, to include Aurora and, thus, bring Progressive within the ambit of that collective agreement. Counsel for the union urged that result either under section 1(4) itself or in conjunction with the remedial relief in the section 89 complaint necessary, in his view, to effectively redress the alleged unfair labour practices.

71. Section 1(4) was enacted to protect established bargaining rights from erosion through various commercial transactions. Section 63, often cited by applicants in the alternative, is the "companion" to section 1(4), in a sense, and is likewise directed to the protection of bargaining rights once achieved. A finding of anti-union animus is not necessary to the operation of sections 1(4) or 63 but neither are anti-union motives irrelevant. One of the purposes of these provisions is to prevent the erosion of bargaining rights where various transactions are entered into to avoid collective bargaining obligations: see, for example, *Guaranteed Insulation*, *supra*; *Kennedy Lodge*, *supra*; *City of Toronto Non-Profit Housing*, *supra*; and *Toronto College Street Centre Limited*, *supra*.

72. The jurisprudence has also consistently articulated the principle that sections 1(4) and 63 are not intended to *expand* the incumbent's bargaining rights and thereby circumvent the certification process: *Silverwood Dairies*, *supra*; *Dominion Stores Limited*, *supra*; and *Mountainview Dairy*, *supra*.

73. In the instant case, what the union seeks would result in the inclusion of over 100 employees at Progressive in the Condor bargaining unit which, before the layoffs, comprised only 44 workers, despite the fact that the respondent has not been found to have committed any unfair labour practices. Even assuming (without deciding) that the Board has the jurisdiction to do so under section 1(4) of itself, the Board is not persuaded that it should so exercise its discretion in the instant case. The Board is not here commenting on the reach of its broad remedial authority to respond adequately to unfair labour practices in conjunction with a section 1(4) application by granting an order such as that sought by the union in appropriate circumstances. The Board is simply saying that no basis has been established in the instant case for departing from the usual form of the declaration which would preserve the existing geographic scope clause of the Condor collective agreement.

74. For the foregoing reasons, the Board exercises its discretion pursuant to section 1(4) of the Act to declare the respondents Progressive, Condor and Innopac, to constitute one employer for purposes of the Act. The Condor collective agreement, including its existing scope clause, is therefore binding on Innopac and Progressive.

75. As noted above, the section 89 complaint is dismissed.

DECISION OF BOARD MEMBER PAT V. GRASSO; May 4, 1990

Based on the evidence before us I would rule that the company has contravened the *Ontario Labour Relations Act* to the extent that I would direct the company to post a notice issued by the Ontario Labour Relations Board. The notice shall be as follows:

Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

This notice is being issued in compliance with an Order of the Ontario Labour Relations Board that was made after a hearing in which both the company and the union had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the *Ontario Labour Relations Act* to the extent that we have been ordered to inform our employees of their rights.

The Act gives all employees the right to:

(a) organize themselves;

(b) form, join and participate in the lawful activities of the trade union, and;

(c) to act together for collective bargaining.

We will offer available jobs at Progressive Packaging to employees who have been laid-off at Condor Laminations.

We will provide the union with a list of names and addresses of all company employees (save and except supervisors, persons above the rank of supervisor, office and sales staff) and keep the list updated on a monthly basis for a period of six months.

This notice is to be posted in conspicuous places on the company premises at Progressive Packaging and Condor Laminations where such notices are likely to come to the attention of the employees, the company shall keep the notices posted for 60 consecutive days and take reasonable steps to make sure that the notices are not altered or covered by any other materials.

We will comply with all directions of the Ontario Labour Relations Board and we will not do anything that may interfere with the employees rights.

Progressing Packaging

_____

Authorized Representative

Condor Laminations

_____

Authorized Representative

THIS IS AN OFFICIAL NOTICE OF THE ONTARIO LABOUR RELATIONS BOARD.

This notice must remain posted for 60 consecutive days.

Date this 4th day of May 1990.

_____

2182-89-R United Brotherhood of Carpenters and Joiners of America, Applicant v. **Repla Limited,** Respondent

Certification - Practice and Procedure - Trade Union - Six month bar imposed against local of union following unsuccessful representation vote - Parent union of local filing certification application 4 weeks later - Whether bar applies to parent union - Whether Board should exercise its discretion to decline to hear application - Application to be processed -Parent union a separate legal entity - Bar not applicable - No compelling reason to decline to entertain application

BEFORE: *Owen V. Gray,* Vice-Chair, and Board Members *R. W. Pirrie* and *E. G. Theobald.*

APPEARANCES: *David Watson* and *Marisa Pollock* for the applicant; *C. E. Humphrey* for the respondent.

DECISION OF OWEN V. GRAY AND BOARD MEMBER, E. G. THEOBALD; May 1, 1990

1. The applicant seeks certification under the *Labour Relations Act* ("the Act") as exclusive bargaining agent for an industrial unit of employees of the respondent. The same unit was the subject of an earlier application by the United Brotherhood of Carpenters and Joiners of America, Local 27 ("Local 27"). This application was filed approximately four weeks after Local 27 lost a representation vote conducted in connection with its application. Pursuant to clause 103(2)(i) of the Act, the Board (differently constituted) dismissed that earlier application and barred any further application by Local 27 for that unit for a period of six months.

2. Clause 103(2)(i) of the Act provides that the Board has the power

> to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

Two distinct powers are conferred by this clause. One is the power to *bar* an "unsuccessful applicant" for a period of up to ten months from the date of dismissal of its application. That power is ordinarily exercised, if at all, when an application is dismissed, and can only affect the rights of the unsuccessful applicant. The second power conferred by clause 103(2(i) is the power to *refuse to entertain* a new application filed within ten months after an unsuccessful application. That power is ordinarily exercised, if at all, when a new application is filed within the subject period. This second power can be invoked against *any* applicant, not just the previously unsuccessful applicant.

3. The respondent objects to the Board's entertaining this application. It argues that, having regard to the provisions of the applicant's constitution, the applicant and its Local 27 are not separate entities and that the bar imposed when the earlier application was dismissed should, therefore, be considered to bar this application. In the alternative, if this applicant is not found to be the same entity which made the previous unsuccessful application, the respondent, argues that we should exercise *our* discretion under clause 103(2)(i) to refuse to entertain this application. In that connection it argues that, under the applicant's constitution, employees on whose membership the applicant relies will become members of Local 27, a result which the respondent says makes this application a scheme to avoid the bar imposed on Local 27. In the further alternative, the respondent argues that if the applicant and Local 27 are treated as separate and distinct entities, then the applicant cannot be found to be a "trade union" within the meaning of clause 1(1)(p) of the Act because it is not an entity in which employees can have direct membership.

4. The applicant's constitution provides that its executive can charter local unions. A local union has its own elected officers. Its affairs are governed by prescribed uniform by-laws. Subject to the approval of one of the General Officers of the applicant, a local may adopt additional by-laws and trade rules so long as they do not conflict with the applicant's constitution. A local union has the power to try its own members on charges of violation of the applicant's constitution or of the local's by-laws or trade rules. Two or more locals in one city must, and locals in adjoining geographic areas may, form a District Council composed of delegates from those local unions. The affairs of a District Council are governed by prescribed uniform by-laws and such additional by-laws not inconsistent with the applicant's constitution as may be adopted by the constituent local unions and approved by an officer of the applicant. Locals may also form State or Provincial Councils. A State or Provincial Council is governed by rules adopted by its membership and approved by an officer of the applicant. Locals, District Councils and Provincial Councils elect delegates to represent them at General Conventions of the applicant. The General Officers of the applicant are elected at the General Convention. When a General Convention is not in session, the affairs of the applicant are governed by a General Executive Board consisting of the General Officers together with others selected from various geographic districts in Canada and the United States. Members of a local have the right to appeal to the General Officers and General Executive Board from local decisions. The General President and General Executive Board each have powers to suspend the powers of Local officers and appoint a trustee to supervise the conduct of affairs of a local and, indeed, to suspend or dispand a local.

5. Section 1 of the applicant's constitution provides that

> This organization shall be known as the United Brotherhood of Carpenters and Joiners of America, and shall consist of an unlimited number of Local Unions and members subject to its laws and usages and shall not be dissolved while there are three (3) dissenting Local Unions.

Membership in one of its locals is treated as membership in the applicant to the extent that the language of the constitution gives the latter concept any independent relevance.

6. The respondent argues that there can be no membership in the applicant except as a result of membership in the local. The applicant says that certain of the provisions of its constitution do contemplate membership otherwise than through membership in a local.

7. Tom Harkness held various offices in the Western Ontario District Council of the applicant from 1949 to 1967 and in the applicant itself from 1967 to his retirement in 1986. During the last seven years of that period he was Canadian Director of organizing for the applicant, reporting directly to the applicant's General President in Washington. He testified that there had been a number of organizing campaigns in Ontario in which the applicant had solicited and received applications for direct membership in the applicant which had then formed the basis of applications to this Board for certification. He identified instances in which the applicant had been granted certification on the basis of such membership evidence. Mr. Harkness said it had been the applicant's practice to organize in this way when, for example, the target employer carried on business in several locations which did not all fall within the geographic jurisdiction of one local. This practice of soliciting applications for direct membership in the applicant was well known to the applicant's General Executive and had not been the subject of any complaint or disapproval.

8. Mr. Harkness noted that people who had not been members of the union before would not know what the difference was between the local and "the international", as he described the applicant. He said the organizers would explain the difference to the new members and it would be up to them to choose. The applicant's counsel specifically asked what happened after certification to members who were organized by the applicant and, particularly, whether they would then be

assigned to a local or continue with "the international". Mr. Harkness answered that it would be up to the affected members to decide whether they would be assigned to a local or continue with the international. None of this testimony was challenged in cross-examination.

9. Unions whose constitutions provide for creation of subordinate "local" unions are often referred to as "parent" unions. The Board has said it will treat a parent union as a "trade union" within the meaning of clause 1(1)(p) where employees are members of the parent union: *Metal Textile Corporation of Canada Limited*, (1955), 55 CLLC ¶18,016; *Carleton Co-operative Milk Transport*, [1970] OLRB Rep. June 305. The Board has also said that evidence of membership in a local union is (*Cochrane-Dunlop Hardware Ltd.*, 63 CLLC ¶16,268) or may be (*Lincoln Graphics Ltd.*, [1969] OLRB Rep. Nov. 983) evidence of membership in the parent union. A bar imposed on a local union under clause 103(2)(i) has not been treated as a bar to application by its parent union, nor has the Board refused to consider a subsequent application by the parent of an unsuccessful applicant in circumstances in which a subsequent application by an unrelated trade union would have been entertained: *Elm Tree Nursing Home*, [1978] OLRB Rep. Nov. 984. (See also *The Clorox Company of Canada Ltd.*, [1980] OLRB Rep. Feb. 184, where an application by a local was entertained during period of bar on applications by parent and *Creeds Storage Ltd.*, [1984] OLRB Rep. May 712, where an application was entertained during period of bar imposed on the applicant's sister local.) The Board has treated a parent union and one of its locals as distinct trade union entities for other purposes, such as a successorship application under section 62: *The Hydro-Electric Commission of the City of Hamilton*, 62 CLLC ¶16,261.

10. Counsel for the respondent invites us to reconsider the Board's conventional notion that a parent and its locals are separate trade unions, in light of the legal characteristics of a trade union as described by the Ontario Court of Appeal in the following often quoted passage from its judgement in *Astgen et al. v. Smith et al*, [1970] 1 O.R. 129, 69 CLLC ¶14,198 (Ont. C.A.) at pp. 133-134 and 135:

> ... I concede at the outset that a labour union under the *Labour Relations Act*, R.S.O. 1960, c. 202, and allied legislation has a "status" conferred by such legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relations to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.
>
> • • • •
>
> ... Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelled out in the memorandum of association usually referred to as the "constitution"; the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill, Rand, J., in *Orchard et al. v. Tunney*, [1957] S.C.R. 436 at p. 445, 8 D.L.R. (2d) 273 at p. 281, stated:
>
> > ... each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that the rules shall bind them in their relations to each other.
>
> I adopt also the proposition stated by Thompson, J., in *Bimson v. Johnston et al.*, [1959] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1958] O.W.C. 217, 12 D.L.R. (2d) 379:

> ... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the unions constitution and by-laws ... The contract is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all other members thereof.
>
> * * *
>
> The contract of association is not between the members and some undefined entity which lacks the capacity to contract; it is a complex of contracts between each member and every other member of the union.

Counsel for the respondent argues that the notion that a parent union is a trade union distinct from its locals cannot and should not be applied here. He argues from the provisions of its constitution that the applicant consists of local unions together with a superadded administrative structure. If one sets aside the locals as being separate trade unions, he argues, the administrative structure which remains cannot itself constitute a trade union.

11. Clause 1(1)(p) of the *Labour Relations Act* defines "trade union" this way:

> "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

In *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 the Board observed that:

> The word "organization" in clause 1(1)(p) is not itself expressly defined. The language of the clause and of other provisions of the Act provides guidance as to what is meant. Clause 1(1)(p) contemplates that the "organization" is something which is "formed" for particular purposes. The language of clauses (l) and (p) of subsection 1(1) and of other sections tell us that the organization is one of which "employees" are "members". Sections 74, 87, 91, 92, 98, 99 and others contemplate that a trade union will have at least one "officer, official or agent" who acts or purports to act on its behalf in matters about which the Act is concerned. These characteristics - membership within a formal structure with defined purposes and action through agents - suggest that the "organization" must either be a corporation without share capital created pursuant to some statute in that behalf or an unincorporated association brought into existence in the manner contemplated by the common law. Some unions in Ontario are corporations. Most are unincorporated associations.

After reciting the above-quoted passage from *Astgen et al. v. Smith et al*, *supra*, the Board observed that

> For the purposes of proceedings under the *Labour Relations Act*, the common law as it relates to unincorporated associations is modified in certain respects by that Act. For example, an individual who is not yet and might never be a member of the association in accordance with the provisions of its constitution may nevertheless be treated as a member for the purpose of the *Labour Relations Act*: see clause 1(1)(l) and subsection 103(4) of the Act and compare *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796 et al.*, [1970] S.C.R 425, 11 D.L.R. (3d) 336, 70 CLLC ¶14,008 (S.C.C.). Subject to the modifications effected by the Act, the question whether something exists as an "organization ... formed for purposes that include the regulation of relations between employees and employers" is governed by the common law principles to which the Court of Appeal made reference in the passage we have quoted from *Astgen et al. v. Smith et al.*, *supra*.

12. The common law perspective which the respondent asks us to apply does not lead us to the result for which it contends.

13. The respondent's argument accepts and depends on the assertion that the applicant's locals are trade unions as defined by the Act. Viewed from the perspective that a trade union has no existence separate from the individuals who have contracted to be members of it, the applicant cannot usefully be described as an organization of local trade unions in any sense which treats the local trade unions as entities distinct from the individuals who comprise their membership. Each local union consist of workers who have agreed to be bound by the uniform local by-laws contemplated by the applicant's constitution and any additional by-laws which have been adopted by that local. As the Ontario Court of Appeal observed in *Astgen et al* v. *Smith et al*, *supra*, that agreement is not with the local union itself, but with all other members of that local union. That is not the only agreement those workers made when they became members of the local, however. When they become members of the local they also became bound by the terms of the applicant's constitution generally. In that respect, and to that extent, each member of each local union has entered into a contract with all of the members of all of the local unions. It is only because the members of each local union have entered into that other contract with that larger group that the General Executive Board and the General Officers of the applicant have authority over the local unions.

14. On this analysis, then, the applicant cannot be seen as anything other than an organization of individuals who have contracted each with the others on certain terms for purposes which include those contemplated by clause 1(1)(p) of the Act. Accordingly, we have no difficulty characterizing that organization as a "trade union" within the meaning of clause 1(1)(p) of the Act even if membership in that organization is always accompanied by membership in a smaller, included organization comprised of individuals who have agreed to be bound each with the others for similar purposes to an additional set of rules governing the operation of a local union. There is no reason why that smaller organization should not also be regarded as a "trade union" for the purposes of the Act.

15. Viewed from the perspective that trade unions do not have a legal existence separate from that of the individuals which comprise their membership, a parent and one of its locals can easily be seen as different organizations if, as here, their memberships are not co-extensive. Apart from that legal difference, there may well be political and financial differences which would be significant to employees in choosing between a parent union and one of its locals as the organization which they wish to have undertake obligations under the *Labour Relations Act* as their bargaining agent. Except in the case of a parent union whose members are all members of a single local, the Board's conventional notion that a parent and its local are distinct organizations for the purposes of the Act is not inconsistent with the analysis of the Ontario Court of Appeal in *Astgen et al v. Smith et al*, *supra*.

16. Nothing in clause 1(1)(p) requires the sort of subtractive analysis proposed by the respondent, in which one asks whether there would be a trade union left if all its subordinate trade unions were subtracted from the applicant. If anything, the express inclusion in clause 1(1)(p) of "provincial, national or international" trade unions suggests the opposite. We would be satisfied that the applicant is a trade union even if the only individuals who had agreed to abide by its constitution were also members of one of its locals.

17. Bearing both that conclusion and the provisions of clause 1(1)(l) of the Act in mind, it is not clear that it matters whether, as the respondent argues, the applicant's constitution does not expressly provide for direct membership -- that is, membership in the applicant unaccompanied by membership in one of its locals. It is not at all clear whether the language of the applicant's constitution does so provide. If failure to so provide is of any relevance in the face of clause 1(1)(l), however, then the evidence of Mr. Harkness together with subsection 103(4) of the Act is a complete answer to any problem that such a failure might otherwise create in this case.

18. We find that the applicant is a trade union within the meaning of the *Labour Relations Act*. For the purposes of that Act, we have no difficulty seeing it as a trade union distinct from the local trade unions to which its members will also belong. On the basis of that distinction, we are content that the bar imposed when Local 27's application was dismissed is not a bar to this application.

19. This application is a subsequent application within the meaning of clause 103(2)(i). We do have jurisdiction under that clause to refuse to entertain this application even though it is made by a trade union which we consider distinct and different from the trade union whose application was earlier dismissed. We do not think that jurisdiction should be exercised in the manner suggested by the respondent in this case.

20. The evidence does not support the proposition that the affected employees will be constitutionally obliged to be represented by Local 27 if this application succeeds. There is no support here for any argument that this applicant is a mere "alter-ego" of the previous unsuccessful applicant or that the applicant is in any other sense Local 27 in disguise. We are entitled to assume that the practice described by Mr. Harkness in testimony led and relied upon by the applicant continues to be the applicant's practice and that the applicant will reciprocate the desire of employees to be represented by it directly rather than by one of its locals.

21. The respondent does not suggest that there are any circumstances here which would lead the Board to refuse to consider an application for certification by a trade union unrelated to the previous unsuccessful applicant. There is a great deal to be said for the proposition that a discretion of the sort conferred on the Board by clause 103(2)(i) should be exercised similarly in analytical similar circumstances in the absence of a compelling reason to do otherwise. We see no such compelling reason here. We are for that reason inclined to exercise our discretion the same way it was exercised by the Board in *Elm Tree Nursing Home*, *supra*. We conclude that this application should be entertained.

DECISION OF BOARD MEMBER ROSS W. PIRRIE; May 1, 1990

1. I dissent from the majority's decision.

2. While I appreciate the Board's long-standing jurisprudence has been to permit related segments of a union's organization to apply and/or be certified in a situation such as existed in this case, I respectfully disagree with the practice.

3. In my view the Board has wrongly interpreted the intent of the Act in such situations, in that its jurisprudence relates to issues concerning which union or segments of a union(s) are entitled to apply for certification in a bar period. In approaching the issue from that point of view, the Board has determined that a very specific organization is barred, ie the specific union organization which initially applied for certification. Any other organization, including the parent or a sister local of such a barred local is not barred. I fail to see the logic in such jurisprudence and I do not believe that was the intent of the legislation.

4. Surely the intent of the legislation was to provide a cooling off period in the work place, and to allow employees a reasonable period in which to reflect on their wishes concerning the entire issue of representation. I would interpret section 103(2)(i) to bar the specific union organization that was unsuccessful in the application, or any other organization from applying for certification during the bar period.

5. To the extent the Board is not likely to overturn its long-standing view of section

103(2)(i) and its consequent jurisprudence without a clear direction from the legislators, it must then continue to turn its attention to the kind of issue raised by this case, ie is or is not the national/international or a sister local of a union the same as, or acting on behalf of an unsuccessful local of that organization. The Board will hear evidence and representations from the parties and issue learned decisions - usually after the bar has expired, as is the case in this instance - with the net result that everyone expends time, energy and money to no avail.

6. Without setting out my view of the evidence the panel heard, or placing my interpretation on the respondent's theory of the organization of the Carpenters union, or the applicants and respondents view of the constitution of the union vis-a-vis membership, I am satisfied there was ample support for the proposition that the substitution of the International for Local 27 was a subterfuge to avoid the bar. I would have refused to entertain the International's application during the bar.

2824-89-R IWA - Canada, Applicant v. **Saxon Athletic Manufacturing Inc.,** Respondent v. Group of Employees, Objectors

Certification - Petition - Practice and Procedure - Timeliness - Whether petition sent to the Board on the terminal date by Priority Post timely - "Registered" mail including Priority Post - Petition timely

BEFORE: *M. G. Mitchnick,* Chair, and Board Members *W. A. Correll* and *R. R. Montague.*

APPEARANCES: *Roman Stoykewych, David W. T. Matheson* and *Harold Sachs* for the applicant; *Peter Quinlan* and *George Markovich* for the respondent; *Cheryl Conway* and *Sonia Williams* for the objectors.

DECISION OF THE BOARD; May 15, 1990

1. This is an application for certification in which the Board fixed March lst, l99O as the "terminal date", or the date under section lO3(2)(j) of the *Labour Relations Act* for the receipt of evidence of "employee wishes" by the Board. Prior to the terminal date the Board was in receipt of a statement of desire or "petition" signed by a number of employees indicating that they did not wish to be represented by the applicant trade union. The number of names on the petition corresponding to individuals who had also signed membership cards indicating a desire to be represented by the applicant was, however, marginally short of that needed to make the said petition "numerically relevant" (subject to the outcome and effect of the employer's charges pertaining to the Union's methods of organizing in this matter). There was, however, a further petition forwarded to the Board on the terminal date, by Priority Post, containing the signatures of two more employees, and the parties recognize that if that second petition were allowed to be added to the first, the question of numerical relevance would be reversed in the petitioners' favour. The Board has accordingly received the extensive submissions of the parties on the issue of whether or not the second of these petitions ought to be accepted by the Board as delivered to it in a "timely" fashion.

2. The Board's Notice to Employees of an Application for Certification provides, in accordance with its Rules of Practice:

> 4.(1) The Board will not hear evidence or representations of employees objecting to certification of the applicant unless one or more documents, sometimes referred to as petitions, expressing objection to the certification of the applicant are filed with the Board.
>
> (2) A document referred to in subsection (1),
>
> (a) must be signed by the objecting employee or employees;
>
> (b) must be,
>
> (i) received by the terminal date if sent other than by registered mail, or
>
> (ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail.

Section 73(l) of the Rules also states:

> Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification for a declaration terminating bargaining rights unless the evidence ...
>
> (b) is filed not later than the terminal date for the application.

At the hearing the Board directed the attention of the petitioners' spokespersons to the above passage in the Notice posted in the workplace, and inquired how it was that the petition in question came to be sent to the Board by "Priority Post". The petitioners acknowledged that they had read the notice, but that they knew that they had reached the last day for the sending of signatures, and that as they believed that these last two signatures might be important to their case, the representative attending at the Post Office inquired of the Post Office clerk what method was available to ensure that the document would get to the Board with the minimum delay possible. The representative was advised that the service she should choose in that circumstance was "Priority Post", as the Post Office would then guarantee next day delivery to Toronto. The petitioners' representative agreed to the selection of that service, and was given a receipt for the document filled out by the postal clerk, and showing both the date and the time of acceptance of that document on behalf of the Post Office.

3. When it comes to compliance with the directions for delivery set out in its Notice to Employees, the Board has on numerous occasions made it clear that "close" is not good enough. In *Durso Steel Limited*, [1988] OLRB Rep. Sept. 883, for example, a petition was left on the Board's reception desk approximately one-half hour after the Board's offices had closed on the terminal date, and the Board ruled that it could not be accepted. The Board in the past has declined to accept as well petitions allegedly sent to it on the terminal date by private courier. Counsel for the Union argues that Priority Post is simply the Post Office's version of private courier service (in fact designed to compete with that), and that the approach of the Board in the past should be applied to the method adopted by the petitioners in this case as well. Counsel notes that this very issue of "Priority Post" has been considered by the Board in the *Westin Hotel* case, [1986] OLRB Rep. Oct. 1486, and held to be unacceptable. For the Board to now alter its approach in the present case, therefore, Counsel submits, would be "unfair in the extreme", and if the Board were inclined to do so, it should do so on a *prospective* basis only.

4. Having considered the matter carefully, the Board does not find the submissions put forward by the Union in the present circumstances to be persuasive. The reason that the Board's Rules and Notice refer to "registered mail" is to attempt to avoid any evidentiary dispute over the

date on which a document not delivered to the Board prior to the terminal date was placed in the custody of the Post Office. It is that act of "registering" delivery with the Post Office that is of interest to the Board, and we do not find ourselves in a position where, from that point of view, we feel we can or ought to say that the petitioners have failed to bring themselves within the language of the Rules or the Notice. Both of those sources of direction, as those who support the timeliness of the petition in this case point out, refer simply to "registered mail", in small letters. There have, however, been substantial initiatives by the Post Office in recent times to upgrade and market its various services offered to the public. From the literature filed with us, for example, it can be seen that the Post Office currently is offering services called "Registered", "Security Registered", and "Priority Courier Service" or "Priority Post". We do not think that the continued efficacy of the Board's Rules of Practice need depend on whether the Post Office in those marketing endeavours chooses from time to time to retain the use of the term "Registered" in its literature, as opposed, for example, to a term like "Secured". Nor do we feel it should depend on whether one service versus another is grouped from time to time in the Post Office's literature under a broader heading of "Registered Mail", as opposed to being represented by the Post Office as another (superior) class of service entirely. A more reasonable and practical approach, we think rather, is to consider the "registrable" elements of the new service being offered, and make a judgement on that basis as to whether it can fairly be said to provide delivery to the Board by a form of "registered mail". The Board's Rules of Practice of course apply to a variety of documents and circumstances, and the more narrow approach would, in addition, for no apparent practical purpose under our Rules, deny all parties the avenue of sending documents to the Board on the terminal date by an enhanced service that would permit the Board to receive and process those documents a great deal sooner than by the original service entitled "Registered Mail".

5. The form adopted here, "Priority Post", is not analogous to private courier service, at least from the point of view of the language of the Board's Rules. To begin with, private courier service is not the "mail". Private courier service also places the attestation of date of delivery to the carrier in the hands of a private operator, rather than a government agency. On the requirement of being "registered", we note that with the "Priority Post" service the written receipt issued by the Post Office at the point of acceptance records not only the date of receipt (the information the Board is concerned with on the receipt for what is presently termed by the Post Office either "Registered" or "Security Registered" Mail) but the time of such acceptance as well. The "registration" particulars for "Priority Post", in other words, contain the critical information that those latter two forms of postal service currently offer, and more. And it is the presence of that written record of receipt itself, provided not by a private service but by the Post Office upon delivery to and acceptance by it of the document, that in our view brings the service currently entitled "Priority Post" within the meaning of the Board's Rules' "registered mail". The decision of the Board in *Westin Hotel*, *supra*, was given orally, as a matter of first impression, and by the time it came to be confirmed by the Board in written reasons, the petition had already been determined to be numerically irrelevant. On the basis of the full examination of the issue made available to us here, we are not persuaded that the decision of the Board in the *Westin Hotel* case, *supra*, was mandated by the language of the Rules, and we respectfully decline to follow it. As for applying what we find to be the appropriate interpretation prospectively only, consideration of that as the Union requests would be called for were there any conduct on the part of the *Union* in reliance upon the comments in the earlier decision of the Board. Here obviously there was none. The Union is simply hopeful, after the fact, that the election by the petitioners' representative to expedite delivery of the remaining signatures to the Board by the higher class of service referred to as "Priority Post" will disentitle the petitioners from having those additional signatures considered by the Board.

6. Accordingly, as the parties were advised on May 1, 1990, the Board accepts as timely the second petition as well in this case, delivered to it by "Priority Post" and so forwarded on the

terminal date set for the application. It should be noted that this case involves simply a full consideration, for the first time, of the expedited-delivery service currently being offered by the Post Office called "Priority Post", and ought not to be viewed as a relaxation in general of the Board's current approach to the filing requirements imposed by its Rules.

1518-89-U Professor Uday Singh, Complainant v. Laurentian University Faculty Association, Respondent

Duty of Fair Representation - Unfair Labour Practice - Failure of union to seek judicial review of arbitral award which dismissed complainant's discharge grievance not breach of fair representation duty

BEFORE: *Nimal V. Dissanayake,* Vice-Chair.

APPEARANCES: *Uday Singh* for the complainant; *Howard Snow* and *Harriet McMorran* for the respondent.

DECISION OF THE BOARD; May 25, 1990

1. The name of the respondent is amended to read: "Laurentian University Faculty Association".

2. The Board first convened as a three person panel to hear this complaint, which alleged violation of "sections 64 to 71 inclusive and section 80, in particular section 68". After the complainant's opening remarks, he agreed that the sole focus of his complaint was that the respondent had contravened section 68 by failing to seek judicial review of an arbitral award ("The O'Shea award"), wherein his discharge grievance was dismissed. Accordingly, the Board proceeded to hear this complaint with just the Vice-Chair sitting alone.

3. The complainant commenced employment with Laurentian University in September 1961 as a lecturer. At the time of his dismissal in 1988, he was a tenured Assistant Professor. On April 18, 1988 the respondent filed a grievance on behalf of the complainant alleging that the University had contravened Articles 1.22 and 2.41 of the collective agreement and seeking reinstatement with full compensation.

4. The grievance was not resolved through the grievance procedure and the respondent applied under section 45 of the *Labour Relations Act* for the appointment of an arbitrator. The Ministry appointed arbitrator O'Shea, who conducted hearings on September 21, 22 and November 2 and 3, 1988. The arbitrator's ultimate award, issued on November 15, 1988, dismissed the grievance.

5. On February 9, 1989 the complainant filed a complaint under section 89, *inter alia*, claiming in essence that the respondent had contravened section 68 of the Act in the manner it conducted the arbitration proceeding before Mr. O'Shea. In a decision dated April 24, 1989 (OLRB File No. 2414-88-U) the Board dismissed the complaint.

6. The complainant felt that the decision of arbitrator O'Shea was patently wrong. He

urged the respondent to seek judicial review of that award. The respondent decided not to do so. This decision was communicated to the complainant by the following letter dated June 7, 1989:

> In reply to your letter of April 5, 1989, the Faculty Association, after consultation with our legal representative, wish to advise you that we do not feel that there are grounds for Judicial Review.

7. It is the complainant's contention in this complaint that in refusing to apply for judicial review of the O'Shea award the respondent contravened section 68 of the Act.

8. Section 68 reads as follows:

> 68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

9. The complainant represented himself at the hearing. At the commencement of the hearing the Board explained, and the complainant appeared to agree, that the University's conduct in its dealings with the complainant including his dismissal and the respondent's conduct in handling his grievance challenging the discharge, were not before the Board in this complaint. Nevertheless, much of the evidence, oral and documentary, and submissions tendered by the complainant pertained to those issues. The employer's conduct was the subject of a grievance and an arbitrator duly appointed under the Act determined that grievance. The complainant's complaint alleging that the respondent contravened section 68 in the manner it dealt with his arbitration came before the Board and was also determined. Obviously, the complainant does not agree with the arbitrator's award or the Board's decision. However, this Board has no jurisdiction over those matters in the course of determining this complaint.

10. The sole issue here is whether the respondent acted in a manner that was arbitrary, discriminatory or in bad faith in refusing to apply for judicial review of the O'Shea award. Therefore, no purpose will be served by reviewing evidence that does not pertain to that narrow issue.

11. Quite understandably, the complainant did not articulate whether he was specifically alleging arbitrariness, discrimination or bad faith. All those elements of "unfair representation" were mentioned during the complainant's testimony. Several times the allegation was made that the legal counsel for the respondent conspired with the University and the arbitrator to defeat his grievance. At another point it was alleged that he would not have been treated in the manner he was if he was "a white man". However, these were bold allegations which were not substantiated by any evidence.

12. The only way to characterize the complainant's case is as follows. It is his position that the O'Shea award is so patently wrong, that it should have been obvious to the respondent that a successful application for judicial review could have been launched. Therefore, a decision not to proceed in the face of that must be arbitrary, discriminatory or in bad faith.

13. In his request dated April 5th that the O'Shea award be judicially reviewed, the grievor stated as follows:

> In response to your letter dated March 15, 1989, to my lawyer Mr. Charles Roach, I wish to state that a review of Mr. O'Shea's decision is warranted on several grounds, four among them being the following:

> 1. The hearing leading to the decision was conducted in my absence, which therefore had to be and was partial.
>
> 2. The decision ignores violations by the University of the collective agreement (specifically of Article 2.41 para. 6).
>
> 3. The decision does not even mention monies due to me from the University, for example that under terms of Ontario's Bill 85, besides others, and
>
> 4. The decision itself is full of lies, for example the last sentence of its page 17 is a deliberate lie.
>
> The chances of such a review's success in court are obvious. To any impartial judge the basic truth of my stand can be proved in a matter of minutes. Of course LUFA knows all that.

14. At the hearing the complainant relied on these four grounds as obvious reasons for a successful judicial review. The respondent took the position that these grounds are unfounded and not likely to be upheld by the courts. The evidence is that it is the usual practice of the respondent to agree to judicially review an arbitration award only if it is satisfied that there are legal grounds for doing so. The evidence indicates that the Chairperson of the Joint Grievance Committee met with the President of the respondent association and the respondent's legal advisor and discussed possible grounds for judicial review of the O'Shea award, including the grounds that had been spelled out in the complainant's letter of April 5th. It was their conclusion that no legal grounds existed to successfully launch an application to the courts.

15. Can it be said that in the particular circumstances the refusal by the respondent to seek judicial review of the O'Shea award constituted arbitrariness, discrimination or bad faith? In my view, the answer is clearly no. In *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417 at 1434 this Board has commented as follows regarding a trade union's obligation when an unsuccessful grievor requests that the unfavourable award be judicially reviewed:

> The fact that Mr. Dwyer demanded his own lawyer does not mean that the union acted arbitrarily when it refused to accede to that demand. Nor given the contractual and legislative requirement that the arbitration process be final and binding, should this Board readily infer that section 68 creates an obligation to seek judicial review or that a trade union acts improperly when it declines to do so. There may be exceptional circumstances where an arbitrator's award is so perverse and pervasive in effect, that regardless of the expense, a union might be considered to be acting arbitrarily if it did not seek review. But that would be a highly exceptional case - unlike the present one. Here there is no basis for the argument that the union acted arbitrarily by declining to finance or participate in a review of the Hinnegan award, or by declining to provide Mr. Dwyer with his own lawyer.

16. In the case of the complainant, his job is at stake. The Board has held that in that situation a union must demonstrate some objective justification for its actions. (*Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35). However, in determining whether there was objective justification the Board does not substitute its own view for the union's by simply asking whether the Board would have reached the same decision as the union. The test was stated in *Dufferin Aggregates*, (*supra*), as follows:

> The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it - rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

17. Applying that standard to the case at hand, I have no difficulty concluding that the respondent's decision that it had no legal grounds to seek judicial review is a reasonable one. Therefore, it did not act improperly when it refused to pursue litigation which it reasonably believed was doomed to failure.

18. In this particular case the Board not only feels that the respondent's decision was not unreasonable, but is inclined to agree with it. The first ground relied on by the complainant for challenging the arbitrator's award is not likely to receive any weight from a court. The evidence is very clear that the complainant demanded that he be allowed to make his own presentation of the grievance to the arbitrator. The arbitrator ruled that the respondent union had carriage of the grievance under the collective agreement and that the complainant was not entitled to make independent representations. In the face of this ruling, the complainant refused to participate in the proceedings and left. Therefore, the respondent had to decide whether to withdraw the grievance or to proceed without the benefit of the complainant's instructions or evidence. It chose the latter option. Therefore, the complainant's absence at the hearing was a result of his own decision to leave because the ruling was not in his favour. Since the respondent did not withdraw the grievance, the arbitrator had no choice but to proceed with the hearing.

19. The complainant's allegation that the arbitration award "ignores violations by the University of the collective agreement (specifically of Article 2.41 para. 16)" is nothing but a statement of disagreement with the arbitrator's interpretation of Article 2.41. The arbitrator did not ignore that article. On the contrary, with detailed reasoning, he has found that there was no violation of the article in question.

20. It is also not surprising that the arbitrator did not deal with the issue of whether the University owed any monies to the complainant. Assuming that the complainant was in fact entitled to the money under the legislation as claimed, that was not properly an issue before the arbitrator. The sole issue before him was whether or not the complainant was discharged for just cause. The collateral issue of pay entitlement does not properly arise in determining that issue.

21. As for the claim that the arbitrator's award is "full of lies", it may be that the complainant disagrees with some of the conclusions of fact reached by the arbitrator. Indeed, it is even possible that some of those facts are in fact inaccurate. Nevertheless, the fact remains that the arbitrator based his conclusions on the evidence before him. The complainant pointed out several instances where witnesses called by the University allegedly gave inaccurate testimony. If the complainant had been at the hearing he would have had the opportunity to properly instruct the respondent's counsel to call evidence to contradict the University's evidence. As it was, the University's evidence went in uncontradicted and unchallenged. The arbitrator can hardly be blamed for accepting the evidence in that situation.

22. The complainant testified that in the past on two occasions he had been invited to attend meetings of the Joint Grievance Committee, when his grievances were being discussed. He argued that the failure to invite him to the meeting at which his request that the O'Shea award be reviewed was discussed, was evidence of bad faith. The respondent's evidence was that it was not the usual practice to invite grievors to attend these meetings. Even assuming that the usual practice was to allow grievors to attend grievance meetings, in the particular circumstances of this case the failure to permit the complainant to attend the meeting does not indicate any impropriety. In his interim award dated September 27, 1988, Arbitrator commented, based on his observation of the complainant's demeanor, that he had a propensity to be "disruptive and argumentative". The complainant demonstrated that same propensity at the hearing before this Board. This Board has held that not permitting a grievor, who is prone to antagonistic behaviour to attend a grievance meeting

is not a violation even where the union's general practice is to invite grievors to such meetings. (*North York General Hospital*, [1984] OLRB Rep. Feb. 286). For the same reason, a violation of section 68 is not indicated by the respondent's failure to invite the complainant to the grievance meeting in question.

23. On the basis of the evidence before the Board, it cannot conclude that any of the representatives of the respondent, who were involved in the decision not to seek review of the O'Shea award acted in a manner that was arbitrary, discriminatory or in bad faith. The individuals concerned discussed the possible grounds for a successful review, including the ones relied on by the complainant. It had the benefit of a lawyer's advice. There is no basis on which to conclude that the decision not to seek judicial review was taken for any other reason than their honest belief that no legal grounds existed to challenge the arbitrator's award.

24. For the foregoing reasons, this complaint is dismissed.

2740-89-FC; 3167-89-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Venture Industries Canada, Ltd.,** Respondent; Randy Burke, Applicant v. National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Respondent

First Contract Arbitration - Practice and Procedure - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed

BEFORE: *K. G. O'Neil,* Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald.*

APPEARANCES: *Daniel Harris, Leo Rustin, Joey Gander* and *Gerry Hanna* for the applicant union; *Frank Angelletti* and *Randy Burke* for the applicant in Board File No. 3167-89-R; *Patrick F. Milloy* and *Stephen Cheifetz* for the respondent, Venture Industries.

DECISION OF THE BOARD; May 31, 1990

1. This decision concerns an application for direction of settlement of a first contract by arbitration (the "first contract application") and an application for termination of the bargaining rights of the union involved in the first contract application (the "termination application").

2. The relevant statutory provisions are as follows:

> 40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

(a) the refusal of the employer to recognize the bargaining authority of the trade union;

(b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;

(c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or

(d) any other reason the Board considers relevant.

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(19) The parties, by agreement in writing, or the Minister may extend any time limit set out in this section, notwithstanding the expiration of such time.

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(22) Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

(a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and

(b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

(23) An application for a declaration that a trade union no longer represents the employees in the bargaining unit filed with the Board after the Board has given a direction under subsection (2) is of no effect unless it is brought after the first collective agreement is settled and unless it is brought in accordance with subsection 57(2).

3. The background of this matter is as follows. The applicant union filed an application for certification on March 25, 1988 and was certified for the relevant bargaining unit by a decision of the Board (differently constituted) dated March 15, 1989 after fifteen days of hearing. A petition was filed in opposition to the union, but was withdrawn after an election to call no evidence on November 9, 1988. Notice to bargain was given on March 23, 1989 and bargaining took place between June 27 and October 23, 1989.

4. A section 89 complaint was filed in January 1989 protesting lay-offs in December 1988 and January 1989. The first contract application was filed on February 8, 1990 and incorporated particulars of the section 89 complaint in its pleadings. Section 40a(2) instructs the Board to make its decision within thirty days of receiving the application, which would have been March 10, 1990. The first hearing date was set for February 19, 1990, but was occupied with preliminary matters. Discussions with a Labour Relations Officer ensued on the next two hearing days, February 21 and 22. The parties agreed on February 22 that the time lines in section 40a would be treated as commencing on the first day of hearing evidence, February 26. The hearing had been anticipated to take three days, and was scheduled to continue on February 27 and conclude on February 28.

Three days proved to be insufficient to finish the case. An additional three days were set on February 28, being March 6, 8 and 22, with a view to making it possible to at least render a "bottom line" decision by March 27, the date thirty days from the commencement of hearing the evidence, the new agreed deadline for the Board's decision.

5. The evidence was substantially complete on March 8, 1990. A small amount of evidence and full submissions were heard on March 22, and the Panel reserved its decision. In the meantime, an application for termination of the union's bargaining rights had been sent, by two methods, courier and registered mail. The courier copy reached the Board on March 21 and the registered mail copy reached the board on March 23, 1990. Under Rule 75(1), the termination application is considered to have been filed on the day of mailing of the registered mail copy, being March 20, 1990.

6. Therefore, an application for termination of bargaining rights had been filed before a decision issued on the first contract application. Section 40a(22) contemplates that the Board will determine the appropriate order in which the two applications will be considered. However, due to the fact that the termination application had not yet gone through the administrative process and reached the panel, the decision directing arbitration of the first collective agreement (with reasons to follow) was issued on March 27, 1990, with no reference to the termination application as the panel itself was not yet aware of it, although it had been filed with the Board.

7. Accordingly, a hearing was scheduled to hear the parties' submissions on how the Board should deal with the termination application. Counsel for the applicants in the termination application (the "petitioners") and counsel for the employer each took the position that the Board should set aside the decision in the first contract application and hear the termination application in its entirety to remedy the prejudice they argued their clients would otherwise suffer. Both urged the Board to give priority to the determination of the wishes of the employees by directing a representation vote. In addressing the Board's decision in *Co-Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. June 828 counsel for the employer submitted that the Act does not differentiate among applications depending on the status of hearings, and that this was an irrelevant consideration. Counsel argued that the Board, in doing so, elevated administrative convenience over substantive rights. Employer counsel also argued that we were "past section 40a(22)" as the Board was now biased in favour of the path on which it had already embarked.

8. The union took the opposite position, arguing that the status of the hearing was a relevant consideration in the exercise of the discretion under section 40a(22). Union counsel submitted that to do as the other parties suggested would be to ignore the substantive rights of the union, and that he was aware of no case where first contract and termination applications were consolidated where the hearing on one had already started. The union took the position that the first contract application was appropriately considered first and asked that the termination application be dismissed.

9. The Board has considered the petitioners' and the employer's requests as an application for reconsideration. This is a two step process, firstly determining whether or not to reconsider, and secondly, whether or not to vary or revoke the decision made. See, among others, *Wallcraft Painting and Decorating Ltd.*, [1989] OLRB Rep. March 306. The Board exercises its discretion to reconsider in very limited circumstances, but these include situations in which there has been no previous opportunity to raise submissions on an issue. (See Practice Note 17.) The situation relating to the termination application described above clearly falls within that category. Therefore, we will reconsider the decision of March 27, 1990. The question to be addressed is whether, on the facts of this case, the Board should vary or revoke the decision.

10. If the Panel had had the two applications before it and the parties' submissions on the order of proceeding before it issued the decision in the first contract application, what would the appropriate order have been? It is clear that each determination under section 40a(22) requires the Board to decide what is the appropriate order, based on the factual circumstances of each case. In *Northfield Metal Products Ltd.*, [1990] OLRB Rep. March 302, the Board received an application for termination of bargaining rights prior to the start of a second group of hearing days, which had been separated from the first group of hearing days by a number of months while the parties attempted, unsuccessfully, to settle the matter at the bargaining table. Referring to the jurisprudence on the issue of the order of consideration of applications under section 40a and applications to terminate bargaining rights, the Board observed at paragraph 11 that:

> ... the status of each application (which has included, depending on the facts, such things as whether hearings have started, whether the evidence is interrelated, whether a decision is about to issue) is a consideration that has been taken into account in the exercise of the discretion.

In deciding to continue with the 40a application, the Board said as follows:

> ... we are of the view that it would be inappropriate to treat the current situation as a new application filed on January 25, 1990, or there would be little incentive to parties in similar circumstances to continue to try to negotiate. Therefore, the Board considered the request to adjourn the first contract application in the context of the scheduled continuation of an application filed on September 26, 1989, on which the Board had already heard three days of evidence, with the related expense to the parties. In making our oral decision, we were of the view that it would be most appropriate in the circumstances of this case to continue with the first contract application so that the parties could have the benefit of the Board's determination of the issues contained therein.

11. The decision of the Board which deals with the fact situation closest to the one before us is *Co-Fo Concrete Forming Construction Limited*, *supra*. A panel of the Board gave an oral direction for arbitration of a first collective agreement where an application for termination had been filed the day before, but was not before the first contract panel. In deciding that it was appropriate in any event to consider the termination application subsequent to the first contract application in the circumstances of the case, the Board said as follows:

> In our opinion, given the time of the filing of the instant application, in the midst of the hearing of the application made under section 40a, it appears to us that this application ought to be considered subsequent to the application for a direction under section 40a. We do so principally on the ground that the panel seized with the application under section 40a had nearly completed its hearing of that application. An application affecting the right of a trade union to represent employees in a bargaining unit requires time to process under the Board's Rules of Procedure since a terminal date must be fixed and notices to employees must be posted. We do not think it is appropriate to suspend the continuation of a hearing in a section 40a application in order to process the kind of applications contemplated by section 40a(22)(a) and (b).

The Board then went on to dismiss the termination application.

12. We agree with the decisions in *Co-Fo Concrete* and *Northfield Metal Products*, *supra*, and are of the view that it is appropriate in the circumstances of this case for the Board to consider the first contract application first. The termination application was filed in the week of the last day of hearing with little more than argument left to complete the case. The parties had already litigated the issues contained in the first contract application for five days. Witnesses for both parties had given detailed evidence of the negotiations and their dissatisfaction with the behaviour of the other party. This represents an investment, not just of time and money, but of expectation of resolution, so the parties can get on with their affairs. Leaving live issues unresolved is generally not healthy for labour relations unless there is a substantial reason for doing so. This expectation must

also be viewed in light of the truism that "labour relations delayed is labour relations denied." The Legislature has seen fit to raise this concern to the level of giving the Board very tight time lines in which to issue its decision in section 40a, an extraordinary provision in the context of legislation which deals with a host of other very important rights without imposing such time lines. To have suspended the first contract application to deal with the termination application would have defeated the legitimate expectation of both parties that the Board would resolve the multi-faceted dispute before it in a timely fashion. We also observe that as in *Northfield Metal Products*, *supra*, what delayed the matter to a point where a termination application was even timely was an attempt to settle the matter prior to starting the evidence, an effort entered into in an attempt to avoid the inevitably difficult and sometimes acrimonious process of litigating the issues present in this case.

13. We are not of the view that we should simply ignore the fact that the first contract hearing was nearly finished and put on the termination application for hearing as suggested. That would produce a result which would not have occurred if the Board had exercised its discretion under section 40a(22) before the issuance of the decision in the 40a application after substantial completion of the hearings. It would also be inconsistent with the furthering of harmonious labour relations, for the reasons set forth above. In considering this matter, it is important to note that no one argued that the evidence in the two applications would have been interrelated, which has been the basis for hearing applications together in cases such as *Mansour Rockbolting*, [1986] OLRB Rep. Oct. 1346 and *Egan Visual Inc.*, [1986] OLRB Rep. Aug. 1071.

14. We do not agree with counsel for the employer that the status of the hearing is an irrelevant consideration. The weight it should be given will obviously depend on all the facts of the case, but it will bear increasing weight as the conclusion of a hearing is approached. Other considerations may make its relative weight insufficient to be acted upon. No considerations of that order pertain in the case before us. This is not an elevation of administrative convenience over substantive rights. Both applications deal with substantive rights. The lack of direction in section 40a(22) as to which application is to be heard first is, in our view, entirely consistent with the fact that all the applications referred to in the section involve substantive rights, which must be balanced on a case by case basis by the Board.

15. Absent clear direction from the Legislature, we see no reason that we should consider the rights of the petitioners as superior to the rights of the trade union so as to constitute a sufficiently compelling reason to cause us to suspend the first contract hearing, as suggested by the employer and the petitioners. The union was duly certified by the Board after lengthy hearings and consideration of many issues. Although the petitioners assert that the union is no longer wanted by the employees, under the *Labour Relations Act* it is the exclusive bargaining agent with rights under section 40a. Section 40a contemplates that a termination application will get prior consideration to a first contract application only where the Board considers it appropriate that this should occur. If the Legislature had considered that the fact of an application alone put the union's bargaining rights in sufficient question to require a representation vote, it could easily have said so. It chose not to. We think this is in accord with the sound policy of allowing the Board to give weight to relevant labour relations considerations in each case when deciding what is appropriate.

16. Employer counsel argues that the Board is inevitably biased in favour of the course embarked upon on March 27, 1990. We do not agree. We have considered the matter of the order that is appropriate without giving any weight to the fact that the decision had already issued. If we were to accept the employer's submission, we would have to consider the reconsideration power given the Board redundant. The Legislature clearly recognized that the Board can take a second look at events without being biased. We consider the facts of this case, involving administrative inadvertence, to constitute a good example of why the power to reconsider is provided.

17. In this case, for the reasons articulated above, it is clear that the Board would have continued the 40a application even if it had had the termination application before it on the date of filing. The prejudice argued from the administrative inadvertence in this case was that the petitioners' application is foreclosed after the direction to arbitrate. Where this would nonetheless have been the case if the section 40a(22) consideration had been done at the earliest opportunity, we do not find merit in the arguments of prejudice. The petitioners rights are not forever foreclosed, in any event. They are postponed until the next open period provided in the legislation.

18. For all these reasons, we find that the appropriate order to consider these applications is to consider the first contract application before the termination application. Nothing said or argued before us impacts on the consideration of the evidence and argument in the first contract application. We therefore see no grounds to vary or revoke the decision issued on March 27, 1990. Accordingly the termination application is dismissed pursuant to section 40a(22).

[*Randy Burke sought judicial review of this decision as well as a stay of further Board proceedings. The High Court on June 21, 1990 denied the applicant leave to have the judicial review application expedited and also dismissed the stay: Editor*]

COURT PROCEEDINGS

0929-88-JD (Court File No. 600/89) Labourers Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089, Applicants v. The Ontario Labour Relations Board and The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 and **Foster Wheeler Limited** and The Metropolitan Toronto Demolition Contractors Association, Respondents

Adjournment - Evidence - Judicial Review - Jurisdictional Dispute - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

Board decision found at [1989] OLRB Rep. Feb. 128.

High Court of Justice, Divisional Court, Trainor, Van Camp, and Gray JJ., May 11, 1990

(endorsement): Application is dismissed. No order as to costs.

The threshold issue before us is whether this court should entertain this application in light of the decision in *Re: Governing Council of the University of Toronto* and *Canadian Union of Educational Workers, Local 2* (1986) 65 O.R. (2d) 268.

The panel of the Board designated to hear this matter on its merits was convened on June 7/89. The hearing was adjourned on consent for judicial review of earlier decisions made by other panels of the Board in this matter.

There is no clear evidence before us that the hearing panel has or will refuse to admit and consider all evidence presented by the parties that is relevant and otherwise admissible and to hear the submissions of counsel relevant to the issues as set out in section 102(13) of the Labour Relations Act.

We therefore consider this matter premature until all issues have been decided on the merits

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0910-89-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Chep Canada Inc. (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor and office and sales staff" (35 employees in unit)

2065-89-R: The Independent Canadian Transit Union (Applicant) v. Blue Line Taxi Co. Ltd. (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all dispatchers and telephone operators (call takers) and shift supervisors of Blue Line Taxi Co. Limited within the meaning of the *Labour Relations Act* as presently in force in the Province of Ontario" (29 employees in unit) (*Having regard to the agreement of the parties*)

2156-89-R: Office & Professional Employees International Union (Applicant) v. District of Thunder Bay Homes for the Aged (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and Secretary to the Administrator" (4 employees in unit) (*Having regard to the agreement of the parties*)

2283-89-R: Canadian Union of Public Employees (Applicant) v. La Section Catholique Du Conseil Scolaire de Langue Francaise D'Ottawa-Carleton (Respondent)

Unit: "tous les employés oeuvrant à titre d'aide-enseignant de l'intimé dans la municipalité regionale d'Ottawa-Carleton, a l'exception des directeurs adjoints et des personnes dont le classement est supérieur à celui de directeur et les personnes au nom de qui un syndicat détient des droits de négociation à la date à laquelle la requête a été soumise" (39 employees in unit) (*Having regard to the agreement of the parties*)

2361-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Seligman & Latz of Polo Park Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent employed at salons located within Simpsons stores in the Regional Municipality of Metropolitan Toronto, save and except salon managers, persons above the rank of salon manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in bargaining units for whom any trade union held bargaining rights as of December 22, 1989" (41 employees in unit) (*Having regard to the agreement of the parties*)

2592-89-R: Energy & Chemical Workers Union (Applicant) v. Sarnia Central Cab Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all drivers employed by the respondent in the City of Sarnia, save and except supervisors, persons above the rank of supervisor, office staff, owner-operators and dispatchers" (43 employees in unit) (*Having regard to the agreement of the parties*)

2622-89-R: United Steelworkers of America (Applicant) v. Chapleau Co-Generation Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Chapleau, save and except supervisors, persons

above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

2666-89-R: Canadian Paperworkers Union (Applicant) v. Great West Timber Ltd. (Respondent)

Unit: "all office and clerical employees of the respondent in the City f Thunder Bay, save and except supervisors, persons above the rank of supervisor, confidential secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

2698-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. The Stairworks Ltd. (Respondent)

Unit: "all employees of the respondent working in and out of Guelph, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

2746-89-R: Canadian Union of Postal Workers (Applicant) v. 419766 Ontario Ltd. c.o.b. Double MM Janitorial Services (Respondent)

Unit: "all employees of the respondent at 70 Trillium Drive, in the City of Kitchener regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

2757-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Seligman & Latz of Polo Park Ltd. (Respondent)

Unit: "all employees of the respondent employed at salons located within Simpsons stores in the Regional Municipality of York, save and except salon managers, persons above the rank of salon manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

2770-89-R: Canadian Union of Public Employees (Applicant) v. Project Hostel Inc. (Respondent) v. Employee (Objector)

Unit: "all employees of the respondent in the Town of Aurora, save and except supervisor, persons above the rank of supervisor, office and clerical staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

2849-89-R: United Steelworkers of America (Applicant) v. Township of Osgoode Care Centre (Respondent)

Unit #1: "all employees of the respondent in its nursing home in the Township of Osgoode, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (23 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in its nursing home in the Township of Osgoode regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (41 employees in unit) (*Having regard to the agreement of the parties*)

2860-89-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Venmar Lisi Inc. (Respondent)

Unit: "all employees of the respondent in the City of Brockville, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (47 employees in unit) (*Having regard to the agreement of the parties*)

2877-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Aurora Photo Engravers Company Ltd. (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except non-working foreman, persons above the rank of non-working foreman, office, clerical and sales staff" (25 employees in unit) (*Having regard to the agreement of the parties*)

2923-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Wellington County Board of Education (Respondent)

Unit: "all employees of the respondent in Wellington County employed as psychologists, speech pathologists and attendance counsellors, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of February 26, 1990" (14 employees in unit) (*Having regard to the agreement of the parties*)

2924-89-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Hamilton Entertainment & Convention Facilities Inc. (Respondent)

Unit: "all employees of the respondent at the Hamilton Convention Centre, 115 King St. West, Hamilton, Ontario, save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of February 26th, 1990 and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2936-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Doral Decorating (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2941-89-R: Canadian Union of Public Employees (Applicant) v. The Governing Council of the University of Toronto (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of foreperson, faculty, office and clerical staff and persons in bargaining units for whom any other trade union held bargaining rights as of February 22, 1990" (182 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2944-89-R: Association of Allied Health Professionals: Ontario (Applicant) v. The Board of Health for the Peterborough County - City Health Unit (Respondent)

Unit #1: "all paramedical employees of the respondent in Peterborough County and the City of Peterborough, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of February 28, 1990" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit#2: "all paramedical employees of the respondent in Peterborough County and the City of Peterborough, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and employees for whom any trade union held bargaining rights as of February 28, 1990" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2945-89-R: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Alta Lab Casework Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2949-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lynx Cabling Systems Ltd. (Respondent)

Unit: "all employees of the respondent working in and out of the Municipality of Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foreman, sales, office and clerical staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

2963-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Procon Developments Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Township of South Himsworth and the surrounding Townships of Chisholm, Nipissing, Machar, North Himsworth, Laurier and Ballantyne, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2974-89-R: Syndicat des employeüs de Modern Window (Applicant) v. Modern Windows V.H. Inc. (Respondent)

Unit: "tous les employés de l'intimé à Hawkesbury, à l'exception des contremaîtres, des personnes ayant le rang supérieur à celui de contremaître, des employés de bureau et de vente" (5 employees in unit) (*Having regard to the agreement of the parties*)

2981-89-R: Construction Workers, Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Allan Michaels Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2982-89-R: Construction Workers, Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Allan Michaels Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

2984-89-R: IWA-Canada (Applicant) v. Taiga Trucking (Ontario) 1980 Inc. (Respondent)

Unit: "all employees of the respondent employed as truck and transport drivers at and out of the District of Thunder Bay, save and except foremen and persons above the rank of foreman" (17 employees in unit) (*Having regard to the agreement of the parties*)

3008-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Peter J. Vicano Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3036-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent)

Unit: "all employees of the respondent engaged in cleaning at 30 Livonia Place, Scarborough, Ontario, including resident superintendents, save and except property manager, persons above the rank of property manager, office, and clerical staff and rental agents" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3045-89-R: International Union, United Plant Guard Workers of America (Applicant) v. The Sisters of St. Joseph of the Diocese of Toronto in Upper Canada (Respondent)

Unit: "all security guards in the employ of the respondent at its health care facilities in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (8 employees in unit) (*Having regard to the agreement of the parties*)

3048-89-R: International Association of Machinists & Aerospace Workers (Applicant) v. Oshawa Community Credit Union Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Oshawa regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

3050-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. S & R Department Store (1976) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Kingston, save and except supervisors, persons above the rank of supervisor, office staff, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (42 employees in unit) (*Having regard to the agreement of the parties*)

3053-89-R: Canadian Paperworkers Union (Applicant) v. Trilake Timber Company Ltd. (Respondent)

Unit: "all employees of the respondent in the District of Kenora, save and except supervisors and persons above the rank of supervisor" (39 employees in unit)

3087-89-R: Service Employees' International Union, Local 204, affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Women in Transition Inc. (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Assistant Manager of Administrative Services, and House Supervisors, and persons above the rank of Assistant Manager of Administrative Services and House Supervisor" (28 employees in unit) (*Having regard to the agreement of the parties*)

3092-89-R: Canadian Union of Public Employees (Applicant) v. Southern Ontario Library Service (Respondent)

Unit: "all employees of the respondent in the City of Waterloo, save and except administrative co-ordinator, persons above the rank of administrative co-ordinator, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

3096-89-R: Canadian Paperworkers Union (Applicant) v. Northland Savings & Credit Union Ltd. (Respondent)

Unit: "all employees of the respondent in Smooth Rock Falls, save and except Managers, persons above the rank of Manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

3166-89-R: Canadian Union of Public Employees (Applicant) v. Lambton County Roman Catholic Separate School Board (Respondent) v. Group of Employee (Objector)

Unit: "all office, clerical and technical employees of the respondent in the County of Lambton, save and except supervisors, persons above the rank of supervisor, administrative assistants, head secretaries of secondary schools, executive secretaries, secretaries to the property manager and plant operations manager, staff development/pay equity officer and persons for whom any trade union held bargaining rights as of March 14, 1990" (122 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3188-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Regal Carpentry Contractors Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3200-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. The Reid's Dairy Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Belleville, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons employed in retail stores, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (29 employees in unit) (*Having regard to the agreement of the parties*)

3227-89-R: The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its business department in the Province of Ontario, save and except credit manager, business manager, controller, accounting manager, secretary to the controller, payroll clerk, secretary to the business manager" (15 employees in unit) (*Having regard to the agreement of the parties*)

3240-89-R: International Alliance of Theatrical Stage Employees & Motion Picture Machine Operators of the United States & Canada, Theatrical Wardrobe Union, Local 822 (Applicant) v. Opera Ghost Productions Inc. (Respondent)

Unit: "all wardrobe attendants employed by the respondent at the Pantages Theatre, 263 Yonge Street, in the Municipality of Metropolitan Toronto, including the position of wardrobe master" (17 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2681-89-R: Independent Canadian Transit Union (Applicant) v. Saint-Vincent Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all lay employees of the respondent at its hospital in the City of Ottawa, save and except the following: medical staff, registered and, graduate nurses (male and female), student nurses, pharmacists, dieticians, food technicians, chief cook, physiotherapists, occupational therapists, speech therapists, psychologists, laboratory and radiology technicians, the administration and clerical staff, foremen, forewomen, supervisors and persons with a rank equivalent to and superior to foremen and forewomen, persons working in a confidential capacity, telephone operators, information clerks, printing staff, buyers, security officers, social workers, case workers, engineers (charter "A"), summer relief students" (618 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	619
Number of persons who cast ballots	315
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	200
Number of ballots marked in favour of intervener	112
Ballots segregated and not counted	1

2926-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Federated Building Maintenance Company Ltd. (Respondent) v. Canadian Textile & Chemical Union (Food & Service Workers Division) (Intervener)

Unit: "all employees of the respondent employed at First Canadian Place in the City of Toronto, save and except persons above the rank of working forelady, working foreladies, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (182 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	185
Persons added to voters' list on consent of parties	12
Number of persons who cast ballots	168
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	163
Number of ballots marked in favour of intervener	4

Applications for Certification Dismissed Without Vote

2963-88-R: United Steelworkers of America (Applicant) v. Goldcrest Furniture Ltd. (Respondent) v. Laundry & Linen Drivers & Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener #1) v. Group of Employees (Intervener #2) (8 employees in unit)

0564-89-R: Peterborough Typographical Union, Local 248 (Applicant) v. Gordon Brooks Holdings Inc. c.o.b. as Lindsay This Week and Victoria County News (Respondent) v. Group of Employees (Objectors) (11 employees in unit)

0720-89-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 732571 Ontario Ltd. and 732570 Ontario Inc. c.o.b. in partnership as Roytec Vinyl Co. (Respondent) v. Group of Employees (Objectors) (92 employees in unit)

1829-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Allan G. Cook Ltd. (Respondent) v. Group of Employees (Objectors) (5 employees in unit)

2436-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dixieline Productions Ltd. (Respondent) (4 employees in unit)

3160-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Olympia & York Developments Ltd. (Respondent) (177 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2683-89-R: The Independent Canadian Transit Union (Applicant) v. Riverside Hospital of Ottawa (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all stationary engineers and persons primarily engaged as their helpers employed in the boiler room of Riverside Hospital in Ottawa, electrician, painter carpenters, steamfitters, plumbers, millwrights and all helpers employed in the maintenance department of the Riverside Hospital except the director of physical plant and grounds keepers and persons at or above the rank of plant superintendent or maintenance supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	7

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0743-89-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Lam Tech Wood Products Inc.; Stack-A-Shelf (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Waterloo, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (59 employees in unit)

Number of names of persons on list as originally prepared by employer	42
Number of persons who cast ballots	39
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	30

1333-89-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. James Dick Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its operations in Erin Township, save and except foremen, those above the rank of foreman, office and sales staff, employees not working more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	16
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	10
Ballots segregated and not counted	2

2080-89-R: Canadian Union of Public Employees (Applicant) v. Thorncliffe Place Retirement Home Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Nepean, save and except the assistant administrator, persons above the rank of assistant administrator and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	30
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	24

2535-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Cold Springs Farm Ltd. (Respondent) v. Cold Springs Farm Employees' Association (Intervener)

Unit: "all employees of the respondent in the Village of Thamesford, Ontario, save and except foremen/supervisors, persons above the rank of foreman/supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (470 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	224
Number of persons who cast ballots	201
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	174

2537-89-R: Teamsters, Local Union 938 (Applicant) v. Browning Ferris Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Durham, save and except supervisor, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (66 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	55
Number of persons who cast ballots	51
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	34
Ballots segregated and not counted	1

2652-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. Sunroot Energy Ltd. (Respondent)

Unit: "all employees of the respondent employed at 5 Farrell Drive in Bruce Township, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	8

Applications for Certification Withdrawn

2056-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Beaverbrook Estates Inc. (Respondent)

2377-89-R: United Steelworkers of America (Applicant) v. Namasco Ltd. (Respondent) v. Group of Employees (Objectors)

2486-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Ultramatic Fire Protection Systems and Ultramatic Fire Systems Ltd. (Respondents)

2811-89-R: Ontario Public School Board Teachers' Federation (Applicant) v. Renfrew County Board of Education (Respondent)

3011-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Smith Folding Carton Ltd. (Respondent)

3046-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent)

3093-89-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Holiday Inn - Airport (Respondent)

3172-89-R: Canadian Paperworkers Union (Applicant) v. Great West Timber Ltd. and Westwind Forest Products Ltd. (Respondent)

3246-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. H & K Maintenance Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

3006-89-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Peacock Lumber Ltd. (Respondent) (*Granted*)

3094-89-FC: Peterborough Typographical Union, Local 248 Printing, Publishing, & Media Workers Sector of the Communications Workers of North America (Applicant) v. Metroland Printing, Publishing & Distributing (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0288-87-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Masonry Contractors Association of Toronto Inc., Skyline Construction Masonry Ltd. and Redwing Masonry Ltd. (Respondent) (*Dismissed*)

1051-89-R: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Nascor Ottawa Ltd. & Wood Systems (Respondent) (*Dismissed*)

1791-89-R; 1792-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 1000 (Applicant) v. Hudson's Bay Company Retail Group/Simpsons Ltd., Seligman & Latz Corporation/Essanelle Division c.o.b. The Regis Corporation (Respondents) (*Withdrawn*)

2264-89-R: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Landmark Structures (Ontario) Ltd. and Landmark Contracting Ltd. (Respondents) (*Withdrawn*)

2413-89-R: Peterborough Typographical Union (Applicant) v. Metroland Printing, Publishing & Distributing Division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)

2797-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. J.D. Caulking Ltd., J.D. Caulking II Ltd., Benkei Enterprises Ltd., and J.D. Caulking (Western Ltd.), J.D. Restoration, Weston Consulting Services (Respondents) (*Granted*)

2842-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Corrweb Litho Inc. and Corrado Graphics Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

0288-87-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Masonry Contractors

Association of Toronto Inc., Skyline Construction Masonry Ltd. and Redwing Masonry Ltd. (Respondent) (*Dismissed*)

1055-89-R: Salaried Employees Alliance ComDev (Applicant) v. Senstar Corporation (Respondent) (*Granted*)

1791-89-R; 1792-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 1000 (Applicant) v. Hudson's Bay Company Retail Group/Simpsons Ltd., Seligman & Latz Corporation/Essanelle Division c.o.b. The Regis Corporation (Respondents) (*Withdrawn*)

2264-89-R: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Landmark Structures (Ontario) Ltd. and Landmark Contracting Ltd. (Respondents) (*Withdrawn*)

2297-89-R: International Association of Machinists & Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Daycon Mechanical Systems Ltd. and Vulcan Machinery & Equipment Ltd. (Respondents) v. Sheet Metal Workers' International Association, Local 397 (Intervener) (*Granted*)

2485-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Ultramatic Fire Protection Systems and Ultramatic Fire Systems Ltd. (Respondents) (*Withdrawn*)

2797-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. J.D. Caulking Ltd., J.D. Caulking II Ltd., Benkei Enterprises Ltd., and J.D. Caulking (Western Ltd.), J.D. restoration, Weston Consulting Services (Respondents) (*Granted*)

3232-89-R: Ellis Packaging Ltd. (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1891-89-R: Marjorie Meighan (Applicant) v. Hotel Motel & Restaurant Employees Union, Local 442 (Respondent) v. Berto's Restaurant Inc. (Intervener) (43 employees in unit) (*Granted*)

2117-89-R: Part-time Employees of the Town of Palmerston (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Town of Palmerston (Intervener)

Unit: "all outside employees of the Corporation of the Town of Palmerston, in the Town of Palmerston, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office, and clerical staff" (12 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	8

2130-89-R: Mary Robinson (Applicant) v. Christina Labour Association of Canada (Respondent) v. Peter Nursing Home Ltd. c.o.b. as Village Haven Rest Home (Intervener)

Unit: "all employees of Peter Nursing Home Ltd. in the Township of Orford, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6

Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

2151-89-R: Terry Fleming (Applicant) v. Teamsters Union, Local 938 (Respondent) v. Lakelands Beverages Inc. (formerly Cavalier Beverages) (Intervener)

Unit: "Certain employees employed by the [company] at North Bay, Ontario, The term 'employee' shall mean all employees at North Bay, Ontario, save and except foremen and supervisors, those above the rank of supervisor, clerical and office staff, temporary employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	8

2227-89-R: Kevin Doris (Applicant) v. Teamsters Local Union 879 (Respondent) v. Ryder Truck Rental of Canada Ltd. (Intervener)

Unit: "all employees of the Ryder Truck Rental of Canada, Limited located at Brantford, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

2310-89-R: Toni Patton (Applicant) v. United Food & Commercial Workers International Union, Local 175 (formerly 206) (Respondent)

Unit: "all employees in Angus, Ontario, save and except the Store Manager, one Assistant Store Manager, persons above the rank of Store Manager and Secretary to the Store Manager" (11 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

2357-89-R: Linda Goodchild, Danielle Picard, Pat McDonald, and Brenda Brewer (Applicants) v. United Food & Commercial Workers International Union, Local 175 CLC-AFL-CIO (Respondent) v. 537670 Ontario Ltd. c.o.b. as Journey's End Motel (Intervener)

Unit: "all employees of the intervener at its motel at 2955 Dougall Avenue, Windsor, Ontario, save and except assistant manager, persons above the rank of assistant manager, office and clerical staff, front desk staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods" (8 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	4

2381-89-R: Hanna Employees (Applicant) v. Labourers' International Union (Respondent) (41 employees in unit) (*Dismissed*)

2527-89-R: Joao Pombinho (Applicant) v. Local 444 C.A.W. (Respondent) (7 employees in unit) (*Dismissed*)

2597-89-R: Violet Soundy (Applicant) v. Canadian Union of Public Employees and its Local 3109 (Respondent) v. Larry Kurtz, Bursar (for Victoria University) (Intervener) Unit: "all employees of Victoria University, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, teaching staff, food service employees, part-time employees employed for not more than 24 hours per week, students employed during the school vacation period, and employees who were part of a recognized bargaining unit as of June 9, 1986" (38 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	39
Number of persons who cast ballots	37
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	24

2645-89-R: Thomas Richard Covell (Applicant) v. Graphic Communications International Union, Local 763-S (Respondent) v. Somerville Packaging, Division of Paperboard Industries Corporation (Intervener) (117 employees in unit) (*Dismissed*)

3009-89-R: Ernest Valente (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Respondent) v. The Hostess Frito-Lay Company (Intervener) (25 employees in unit) (*Dismissed*)

3013-89-R: Martin Lewis (Applicant) v. United Steelworkers of America (Respondent) v. Wiresmith Ltd. (Intervener) (*Withdrawn*)

3052-89-R: Frank Spizzirri (Applicant) v. United Steelworkers of America, Local 2729 (Respondent) v. Masco Electroplating Co. Ltd. (Intervener) (2 employees in unit) (*Granted*)

3061-89-R: Kevin Lloyd and other employees (Applicant) v. Hotel Employees & Restaurant Employees Union, Local 75 (Respondent) v. Chrysalis (Bemelman's Restaurant) (Employer) (40 employees in unit) (*Granted*)

3086-89-R: Employees of the editorial department at the Daily Press (Applicant) v. United Steelworkers of America (Respondent) v. The Daily Press, Editorial Department (Intervener) (10 employees in unit) (*Granted*)

3100-89-R: Kevin Prendergast (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 414 (Respondent) v. Columbia Lumber Company Ltd. (Intervener) (20 employees in unit) (Granted)

3134-89-R: Gail Hardy (Applicant) v. London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondent) v. Pinehill Cottage (Intervener) (6 employees in unit) (*Dismissed*)

3139-89-R: Pamela Pahl et al. (Applicant) v. United Steelworkers of America, Local 6709 (Respondent) v. Allan & Marion Super Discount Marts Ltd. (Intervener) (23 employees in unit) (*Granted*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

2624-89-M: Corporation of the County of Simcoe (Trillium Manor Home for the Aged) (Employer) v. Ontario Nurses' Association (Trade Union) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3063-89-U: Council of Printing Industries of Canada on behalf of Photo Engravers & Electrotypers Ltd. (Applicant) v. Graphic Communications International Union, Local 500M (Roto Gravure) and those persons listed in Schedule '1' to the application (Respondents) (*Dismissed*)

3064-89-U: Council of Printing Industries of Canada on behalf of Photo Engravers & Electrotypers Ltd. (Applicant) v. Graphic Communications International Union, Local 500M (Lithographers) and those persons listed in Schedule '1' to the application (Respondents) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3265-89-U: Cecchetto & Sons Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Respondent) (*Granted*)

0001-90-U: Tesc Contracting Ltd., Copper Cliff Mechanical & Steel Fabricating Ltd. (Applicants) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2553-89-U: Peterborough Typographical Union, Local 248 (Applicant) v. Metroland Printing, Publishing & Distributing Division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0262-87-U: Hewlette Charles (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1661 (Respondents) v. Duplate Division of PPG Canada Inc. (Intervener) (*Withdrawn*)

2943-88-U: Norman Kalo (Complainant) v. United Steelworkers of America, Local 7135 (Respondent) v. National Steel Car Ltd. (Intervener) (*Withdrawn*)

0354-89-U; 0367-89-M: The Society of Ontario Hydro Professional & Administrative Employees (Complainant) v. Ontario Hydro (Respondent) v. The Coalition to stop the certification of the Society, on behalf of certain employees (Intervener) (*Dismissed*)

0373-89-U: Don Poursanidis (Complainant) v. Canadian Automobile Workers, Local 707 (Respondent) (*Withdrawn*)

1397-89-U; 1457-89-U: United Food & Commercial Workers International Union (Complainant) v. 724342 Ontario Ltd. (Respondent) (*Withdrawn*)

1903-89-U: Garry W. Grimoldby (Complainant) v. John Kenyon Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 537 (Intervener) (*Dismissed*)

2073-89-U: London & District Service Workers' Union, Local 220 (Complainant) v. St. Williams Nursing Home (Respondent) (*Withdrawn*)

2192-89-U: Retail, Wholesale & Department Store Union (Complainant) v. Western Inventory Services Ltd. (Respondent) (*Withdrawn*)

2221-89-U: Canadian Union of Public Employees, Local 794 (Complainant) v. Hamilton General Hospital (Respondent) (*Withdrawn*)

2389-89-U: Ontario Public Service Employees Union (Complainant) v. Hawkesbury & District General Hospital (Respondent) (*Withdrawn*)

2412-89-U: Peterborough Typographical Union (Applicant) v. Metroland Printing, Publishing & Distributing Division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)

2443-89-U: United Steelworkers of America (Complainant) v. ICG Utilities (Ontario) Ltd. (Respondent) (*Withdrawn*)

2566-89-U: James Francis McKeary (Complainant) v. Boilermakers Apprenticeship Committee of Ontario, Robert D. Harrack, Joseph Maloney and Local 128, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and Reginald White (Respondents) (*Withdrawn*)

2601-89-U: Canadian Union of Public Employees and its Local 3419 (Complainant) v. Harrowood Seniors Community (Respondent) (*Withdrawn*)

2668-89-U: Leslie Gasper (Complainant) v. U.S.W.A., Local No. 7193 and Alcan Extrusions (Respondents) (*Withdrawn*)

2729-89-U: Islay (DeHoog) Heyd (Complainant) v. Vulcan Packaging Ltd. and Local Union 1008 CAW/TCA (Respondents) (*Withdrawn*)

2743-89-U: Labourers' International Union of North America, Local 527 (Complainant) v. Fidecon Corporation (Respondent) (*Granted*)

2744-89-U: United Steelworkers of America (Complainant) v. MacIsaac Explorations Ltd. (Respondent) (*Withdrawn*)

2754-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Norman A. Faucher Ltd. (Respondent) (*Withdrawn*)

2755-89-U: Energy & Chemical Workers' Union, Local 36 (Complainant) v. The Exolon-Esk Company of Canada, Ltd. (Respondent) (*Withdrawn*)

2762-89-U; 2838-89-U: Energy & Chemical Workers Union (Complainant) v. Sarnia Central Cab Inc. (Respondent) (*Granted*)

2782-89-U: United Food & Commercial Workers International Union (Complainant) v. Bernd Morishe *per* Primo Foods/Bracebridge (Respondent) (*Withdrawn*)

2796-89-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America, (Complainant) v. J D Caulking Ltd., J D Caulking II Ltd., and Benkei Enterprises Ltd. (Respondents) (*Withdrawn*)

2798-89-U: Mordechai (Mike) Akerman (Complainant) v. Local #43 C.U.P.E. (Metropolitan Toronto Civic Employees Union and Municipality of Metropolitan Toronto (Metro Works Dept.) (Respondents) (*Dismissed*)

2806-89-U: John Nash - Andy Root (Complainants) v. Carpenters' Union, Local 93 Ottawa Ontario (Respondent) (*Withdrawn*)

2809-89-U: Ontario Public Service Employees Union (Complainant) v. Elizabeth Fry Society of Ottawa (Respondent) (*Withdrawn*)

2829-89-U: Wendy Kelly (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, Local 1839 (Respondent) (*Withdrawn*)

2839-89-U: Vito Gironda (Complainant) v. C.U.P.E., Local 1280; Metropolitan Separate School Board (Respondents) (*Withdrawn*)

2843-89-U: Graphic Communications International Union, Local 500M (Complainant) v. Corrweb Litho Inc. and Corrado Graphics Ltd. (Respondents) (*Granted*)

2851-89-U: Leo J. Dzura (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Dismissed*)

2903-89-U: United Food & Commercial Workers International Union (Complainant) v. Bernd Morishe & others *per* Primo Foods/Bracebridge (Respondent) (*Withdrawn*)

2907-89-U: Blake Foster (Complainant) v. Chrysler Can. Ltd. (Respondent) (*Withdrawn*)

2947-89-U: Bonar Inc. (Complainant) v. Canadian Paperworkers Union, Local 1178, Dave Holsey, Gary Smith, Rick Schmidt and George Perzul (Respondents) (*Withdrawn*)

2994-89-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Concrete Column Clamps (C.C.C.) Ltd. (Respondent) (*Withdrawn*)

3026-89-U: William Egan (Complainant) v. International Brotherhood of Painters & Allied Trades, (I.B-.P.A.T.) (Respondent) v. The Ontario Allied Construction Trades Council (Intervener) (*Withdrawn*)

3058-89-U: Edmund M. Kay (Complainant) v. Communications & Electrical Workers of Canada, Local 26 (Respondent) (*Withdrawn*)

3076-89-U: Steve Laflamme (Complainant) v. Jean Lalonde (manager Boots Buds Selby Hotel) (Respondent) v. Local 280 Beverage Dispensers' & Bartenders' Union (Intervener) (*Withdrawn*)

3103-89-U: Graphic Communications International Union, Local 500M (Complainant) v. Aurora Photo Engravers Company Ltd. (Respondent) (*Withdrawn*)

3220-89-U: International Association of Machinists & Aerospace Workers (Complainant) v. Oshawa Community Credit Union Ltd. (Respondent) (*Withdrawn*)

3258-89-U: The International Union, United Automobile Aerospace & Agricultural Implement Worker of America (UAW) and its Local 251 (Complainant) v. Benn Iron Foundry Ltd. (Respondent) (*Dismissed*)

3266-89-U: Cecchetto & Sons Ltd. (Complainant) v. United Association of Plumbers & Pipefitters of America, Local 800 and Mike Zangari (Respondents) (*Withdrawn*)

0047-90-U: Thomas Rawn, Don Service, Tom Bettles, Stephen Alfred Cleary (Complainants) v. Russ Graham, Bill Denbok (Goodyear) (Respondents) (*Dismissed*)

0115-90-U: Hugh F. McKay (Complainant) v. Lafarge Canada (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2605-89-M: Mr. Lee Quinn (Applicant) v. Teamsters, Local 91 (Respondent Trade Union) v. Corporation of the City of Gloucester (Respondent Employer) (*Granted*)

2732-89-M: Doreen Liedeman (Applicant) v. Canadian Union of Public Employees (Respondent Trade Union) v. Vaughan Public Libraries (Respondent Employer) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0927-88-M: Laundry & Linen Drivers & Industrial Workers, Local 847 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Goldcrest Furniture

Ltd. (Respondent) v. Gerardo Mercante, Vincenzo Reda, Franco Bini and the United Steelworkers of America (Interveners) (*Granted*)

2691-89-M: Aluminart Products Ltd. (Applicant) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Respondent) (*Withdrawn*)

2812-89-M: The York Region Roman Catholic Separate School Board (Employer) v. C.U.P.E., Local 2331 (Trade Union) (*Granted*)

2861-89-M: Ella Skinner Uniforms Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

2929-89-M: 723779 Ontario Ltd. c.o.b. as Strano Foods (Employer) v. Christian Labour Association of Canada (Trade Union) (*Granted*)

3204-89-M: Work Wear Corporation of Canada Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

0477-85-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 599 (Complainant) v. Armbro Materials & Construction Ltd., and Labourers' International Union of North America, Local 183 (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. Metropolitan Toronto Sewer & Watermain Contractors Association (Intervener #2) (*Dismissed*)

0977-86-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 and International Brotherhood of Electrical Workers, Local 353 (Complainants) v. Pigott Construction Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) v. Labourers' International Union of North America, Local 506 (Intervener) (*Dismissed*)

2756-88-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 819 (Complainant) v. Sheet Metal Workers' International Association, Local 47 and E.S. Fox Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1292-89-M: Ontario Nurses' Association (Applicant) v. Hotel Dieu of St. Joseph's Hospital of Windsor (Respondent) (*Dismissed*)

1478-89-M: The City of Cornwall (Applicant) v. C.U.P.E., Local 3251 (Respondent) (*Withdrawn*)

2250-89-M: Nicola Bartolomeo (Applicant) v. Canadian Food Workers Union (Respondent) (*Withdrawn*)

2316-89-M: Service Employees Union, Local 183 (Applicant) v. Applefest Lodge Retirement Home (Respondent) (*Dismissed*)

2582-89-M: Peterborough Civic Hospital (Applicant) v. Ontario Public Service Employees Union, Local 345 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1904-89-OH: Garry W. Grimoldby (Complainant) v. John Kenyon Ltd. (Respondent) v. Sheet Metal Workers' Association, Local 537 (*Dismissed*)

2825-89-OH: Tom Methven (Complainant) v. Granada Canada (Respondent) (*Withdrawn*)

2850-89-OH: Leo J. Dzura (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Dismissed*)

3004-89-OH: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 5 (Complainant) v. George & Asmussen Ltd. Masonry Contractors (Respondent) (*Withdrawn*)

ENVIRONMENTAL PROTECTION ACT

2388-89-EP: Ron Galloway (Complainant) v. Armtec Inc. (Respondent) v. United Steelworkers of America (Intervener) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2088-88-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Commercial Contracting Corporation of Canada, Ltd. (Respondent) (*Granted*)

2969-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. 555286 Ontario Ltd. O/A City Steel Construction (Respondent) (*Withdrawn*)

1049-89-G; 1050-89-G: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Nascor Ottawa Ltd. & Wood Systems (Respondent) (*Dismissed*)

1329-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Enzo Testaguzza c.o.b. as Regina Ornamental Iron Works Co. and Regina Steel Ltd. (Respondents) (*Granted*)

2012-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Marzin Construction Division of 731358 Ontario Ltd. (Respondent) (*Granted*)

2172-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. The Second Cup (Respondent) (*Granted*)

2263-89-G: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Landmark Structures (Ontario) Ltd., and Landmark Contracting Ltd. (Respondents) (*Withdrawn*)

2400-89-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Local 5 Ont.) (Applicant) v. George & Asmussen Ltd. Masonry Contractors (Respondent) (*Withdrawn*)

2580-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Framing (Respondent) (*Withdrawn*)

2600-89-G: Labourers' International Union of North America, Local 607 (Applicant) v. Burnett Masonry (Respondent) (*Withdrawn*)

2607-89-G: Ontario Sheet Metal Workers' Conference, Local Union 30 (Applicant) v. Provincial Industrial Roofing (Respondent) (*Withdrawn*)

2696-89-G; 2922-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Dalron Construction (Respondent) (*Granted*)

2726-89-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Leon's Masonry Inc. (Respondent) (*Granted*)

2977-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Di-Al Construction Ltd. (Respondent) (*Withdrawn*)

2989-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93, Roy Gagne & Fernand Lacelle (Applicants) v. Markus Construction (688996 Ontario Inc.) (Respondent) (*Withdrawn*)

3007-89-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Nicholls Radtke & Ass. Ltd. (Respondent) (*Withdrawn*)

3056-89-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Mike's Painting & Decorating A Division of Mike Mahons Painting & Decorating Ltd. (Respondent) (*Granted*)

3070-89-G; 3071-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)

3077-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Framing (Respondent) (*Withdrawn*)

3080-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 54551 Ontario Ltd. (Respondent) (*Withdrawn*)

3081-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Interior Projects (Respondent) (*Withdrawn*)

3082-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Dyna-Temp Systems (Respondent) (*Withdrawn*)

3109-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Belvedere Drain & Concrete (Respondents) (*Withdrawn*)

3110-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Brentview Construction Ltd. (Respondents) (*Withdrawn*)

3111-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Choiceland Ltd. (Respondents) (*Withdrawn*)

3112-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Columbia Drain & Concrete Contractors Ltd. (Respondents) (*Withdrawn*)

3113-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Dolente & Drain Co. (Respondents) (*Withdrawn*)

3114-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Domenic Di Carlo Ltd. (Respondents) (*Withdrawn*)

3115-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Donald Construction Ltd. (Respondents) (*Withdrawn*)

3116-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Dranco Construction Ltd. (Respondents) (*Withdrawn*)

3117-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Jentry Construction Ltd. (Respondents) (*Withdrawn*)

3118-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Rinlor Construction Ltd. (Respondents) (*Withdrawn*)

3119-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Pro-Drain (1984) Construction Ltd. (Respondents) (*Withdrawn*)

3120-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Starcon Concrete & Drain Inc. (Respondents) (*Withdrawn*)

3121-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Tempo Concrete & Drain Ltd. (Respondents) (*Withdrawn*)

3122-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Toronto Concrete & Drain Ltd. (Respondents) (*Withdrawn*)

3123-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Westcon Construction Ltd. (Respondents) (*Withdrawn*)

3124-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Concrete & Drain Contractors Association and Zicardo Construction Ltd. (Respondents) (*Withdrawn*)

3125-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Goldstar Drain & Concrete (Respondent) (*Withdrawn*)

3126-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. San-Jac Concrete & Drains (Respondent) (*Withdrawn*)

3140-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Frankfurt Investments Ltd. (Respondent) (*Withdrawn*)

3152-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Harbridge & Cross Ltd. (Respondent) (*Withdrawn*)

3153-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Interior Projects (Respondent) (*Withdrawn*)

3154-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Baxter-Roberts Inc. (Respondent) (*Withdrawn*)

3177-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Terron Mechanical Ltd. (Respondent) (*Granted*)

3178-89-G; 0090-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Arc-Way Welding (1972) Ltd. (Respondent) (*Granted*)

3193-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Crete-Con Construction Ltd. (Respondent) (*Granted*)

3219-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. D. E. Witmer Plumbing & Heating Ltd. (Respondent) (*Granted*)

0014-90-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. L. J. Masonry Ltd. (Respondent) (*Granted*)

0016-90-G: International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. JCP Painting & Associates (Respondent) (*Granted*)

0050-90-G: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Gjehub Mechanical Contractors Ltd. (Respondent) (*Granted*)

0086-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Delta Electric Eastern (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1542-84-U: Reuben Johnson (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE) (Travailleurs Unis de l'Electricite, Radio et Machinerie du Canada (TUE) (*Dismissed*)

0445-87-U: Jean Liebman (Complainant) v. York University Staff Association and York University (Respondents) (*Dismissed*)

2304-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Nepean Bus Lines Inc. (Respondent) (*Dismissed*)

2305-87-U: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Nepean Bus Lines Inc. (Respondent) v. Dave Loney (Objector) (*Granted*)

2999-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Famalicao Finish Carpentry (Respondent) (*Granted*)

3324-87-R United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Famalicao Finish Carpentry (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

0089-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Famalicao Finish Carpentry and Labourers' International Union of North America, Local 183 (Respondents) (*Granted*)

2018-88-U; 2019-88-U; 3122-88-U: United Steelworkers of America (Applicant) v. Plaza Fiberglas Manufacturing Ltd. and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron (Respondents) (*Dismissed*)

0815-89-OH: Everette Chapelle (Complainant) v. Toronto Transit Commission Wheel Trans Department (Respondent) (*Dismissed*)

1021-89-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Steelfab Mechanical Maintenance Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1580-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Russell H. Stewart Construction Company Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

2276-89-U: William John Button (Complainant) v. Amalgamated Clothing & Textile Workers Union (Respondent) (*Dismissed*)

2912-89-U: Jim Howlett (Complainant) v. Benn Iron Foundry (Respondent) (*Dismissed*)

Ontario Labour Relations Board,
400 University Avenue,
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REPORTS

June 1990

Ontario

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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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1. Agassiz Forestry/Environmental Services, The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John Knight and Lorraine Norris c.o.b. as; Re O.P.S.E.U. 633

2. Al Gordon Electric Limited; Re I.B.E.W., Local 120; Re Group of Employees 637

3. Algonquin College of Applied Arts and Technology, The Crown in right of Ontario as represented by the Ministry of Natural Resources and the Board of Governors of; Re O.P.S.E.U. 644

4. Caravan Trailer Rental Co. Limited; Re I.A.M., Local Lodge 2511 and District Lodge 717. 647

5. Horton CBI, Limited; Re Leo E. Evans, Joe L. Da Silva, Terrance R. McGuire, and Sanford Jones; Re B.B.F., Local 128 648

6. Johnson Controls Ltd.; Re C.A.W.; Re Group of Employees 651

7. Landmark Contracting Ltd. and Landmark Structures (Ontario) Ltd.; Re B.S.O.I.W., Local 721 660

8. Pinkerton's of Canada Ltd.; Re C.G.A; Re Richard Bibeault; Re Inco Limited; Re Attorney-General of Ontario; Re National Protective Services Company Limited; Re George Faulkenburg; Re Board of Management for the Metropolitan Toronto Zoo; Re International Union United Plant Guards, Local 1962; Re Ron Saxton; Re Burns International Security Services Limited; Re Gordon A. Southorn; Re Wackenhut of Canada Limited; Re Shane Freeman; Re U.S.W.A.; Re Larry Bishop 671

9. Roytec Vinyl Co., 732571 Ontario Ltd. and 732570 Ontario Inc. c.o.b. in partnership as; Re Laundry & Linen Drivers and Industrial Workers Union, Local 847, affiliated with the Teamsters Union; Re Group of Employees 720

10. Seneca College of Applied Arts and Technology; Re O.P.S.E.U. and its Local 561 and Leslie Charbon 730

11. W.G. Gallagher Construction Limited; Re The Ontario Council of P.A.T.; Re P.A.T., District Council 46 735

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1. Plaza Fibreglas Manufacturing Ltd., Plaza Electroplating Ltd., Citcor Manufacturing Ltd. and Sabina Citron; Re Ontario Labour Relations Board and U.S.W.A. 737

2. Todd Ramsay Interiors Inc. and James R. Todd; Re C.J.A., Local 93 and the Ontario Labour Relations Board 738

3. Venture Industries Canada Limited, C.A.W. and Ontario Labour Relations Board; Re Randy Burke 739

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Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where congent reason for request not provided to Board - Proceeding adjourned *sine die*

W.G. GALLAGHER CONSTRUCTION LIMITED; RE THE ONTARIO COUNCIL OF P.A.T.; RE P.A.T., DISTRICT COUNCIL 46 744

Adjournment - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD 748

Certification - Charter of Rights and Freedoms - Constitutional Law - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter -Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

PINKERTON'S OF CANADA LTD.; RE C.G.A; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP 673

Certification - Construction Industry - Practice and Procedure - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining membership support as of application date - Board explaining its rationale for different

practices in the construction industry - Board not departing from its usual practice in this case

AL GORDON ELECTRIC LIMITED; RE I.B.E.W., LOCAL 120; RE GROUP OF EMPLOYEES 637

Certification - Intimidation and Coercion - Membership Evidence - Employer arguing that union "bought" memberships by providing valuable merchandise to employees who signed membership cards and paid $1.00 - Employer arguing that vote required to remove "cloud" or that all cards should be disregarded - Board determining that such allegations must be made in a timely and particularized manner - Giving out of merchandise not condition of signing a card - Union's conduct did not cross line from salesmanship to buying of memberships - Certificate issuing

JOHNSON CONTROLS LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES 651

Certification - Membership Evidence - Practice and Procedure - Timeliness - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union - Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed

ROYTEC VINYL CO., 732571 ONTARIO LTD. AND 732570 ONTARIO INC. C.O.B. IN PARTNERSHIP AS; RE LAUNDRY & LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847, AFFILIATED WITH THE TEAMSTERS' UNION; RE GROUP OF EMPLOYEES 727

Charter of Rights and Freedoms - Certification - Constitutional Law - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter -Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

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Collective Agreement - Union Security - Union alleging that employer failed to remit to it dues that had been deducted from employees' pay pursuant to a collective agreement - Matter had originally been settled at arbitration on agreement of the parties that the dispute would

be submitted as a complaint to the Board - Board dismissing complaint for lack of jurisdiction - Matter is one for a grievance arbitration board - Board's jurisdiction cannot be expanded by the parties' agreement

CARAVAN TRAILER RENTAL CO. LIMITED; RE I.A.M., LOCAL LODGE 2511 AND DISTRICT LODGE 717 647

Colleges Collective Bargaining Act - Crown Transfer - Crown contracting out operation and maintenance of campground and access point in provincial park to community college - Board having no jurisdiction to issue a declaration under the *Crown Transfers Act* where transfer is from the Crown to a community college - Application dismissed

ALGONQUIN COLLEGE OF APPLIED ARTS AND TECHNOLOGY, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND THE BOARD OF GOVERNORS OF; RE O.P.S.E.U. 644

Colleges Collective Bargaining Act - Discharge - Practice and Procedure - Unfair Labour Practice - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON 739

Constitutional Law - Certification - Charter of Rights and Freedoms - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter -Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

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Construction Industry - Adjournment - Construction Industry Grievance - Practice and Procedure - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where congent reason for request not provided to Board - Proceeding adjourned *sine die*

W.G. GALLAGHER CONSTRUCTION LIMITED; RE THE ONTARIO COUNCIL OF P.A.T.; RE P.A.T., DISTRICT COUNCIL 46 744

Construction Industry - Adjournment - Construction Industry Grievance - Judicial Review - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD 748

Construction Industry - Certification - Practice and Procedure - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining membership support as of application date - Board explaining its rationale for different practices in the construction industry - Board not departing from its usual practice in this case

AL GORDON ELECTRIC LIMITED; RE I.B.E.W., LOCAL 120; RE GROUP OF EMPLOYEES 637

Construction Industry - Health and Safety - Picketing - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128 648

Construction Industry - Related Employer - Remedies - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights

LANDMARK CONTRACTING LTD. AND LANDMARK STRUCTURES (ONTARIO) LTD.; RE B.S.O.I.W., LOCAL 721 660

Construction Industry Grievance - Adjournment - Construction Industry - Practice and Procedure - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where congent reason for request not provided to Board - Proceeding adjourned *sine die*

W.G. GALLAGHER CONSTRUCTION LIMITED; RE THE ONTARIO COUNCIL OF P.A.T.; RE P.A.T., DISTRICT COUNCIL 46 744

Construction Industry Grievance - Adjournment - Construction Industry - Judicial Review - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Other-

wise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD 748

Crown Transfer - Colleges Collective Bargaining Act - Crown contracting out operation and maintenance of campground and access point in provincial park to community college - Board having no jurisdiction to issue a declaration under the *Crown Transfers Act* where transfer is from the Crown to a community college - Application dismissed

ALGONQUIN COLLEGE OF APPLIED ARTS AND TECHNOLOGY, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND THE BOARD OF GOVERNORS OF; RE O.P.S.E.U. 644

Crown Transfer - Respondent partnership entering into a contract with the Crown in respect of a creel survey - Creel survey part of Crown's fisheries program and had been performed by Crown employees in the past - Board finding creel survey to be an "undertaking" within the Act that had been "transferred" to an "employer" - Respondent was an "employer" regardless of whether the partnership hired anyone to assist partners in performing the survey - Respondent bound by collective agreement between union and Crown

AGASSIZ FORESTRY/ENVIRONMENTAL SERVICES, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES, AND JOHN KNIGHT AND LORRAINE NORRIS C.O.B. AS; RE O.P.S.E.U. 633

Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A. 747

Discharge - Colleges Collective Bargaining Act - Practice and Procedure - Unfair Labour Practice - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no

improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON 739

Duty to Bargain in Good Faith - Damages - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

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Final Offer Vote - Damages - Duty to Bargain in Good Faith - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

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First Contract Arbitration - Judicial Review - Practice and Procedure - Stay - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitra-

tion - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE 749

Health and Safety - Construction Industry - Picketing - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128 648

Interference in Trade Unions - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

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Intimidation and Coercion - Certification - Membership Evidence - Employer arguing that union "bought" memberships by providing valuable merchandise to employees who signed membership cards and paid $1.00 - Employer arguing that vote required to remove "cloud" or that all cards should be disregarded - Board determining that such allegations must be made in a timely and particularized manner - Giving out of merchandise not condition of signing a card - Union's conduct did not cross line from salesmanship to buying of memberships - Certificate issuing

JOHNSON CONTROLS LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES 651

Judicial Review - Adjournment - Construction Industry - Construction Industry Grievance - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached

collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD..... 748

Judicial Review - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

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Judicial Review - First Contract Arbitration - Practice and Procedure - Stay - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE..... 749

Lockout - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of

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ROYTEC VINYL CO., 732571 ONTARIO LTD. AND 732570 ONTARIO INC. C.O.B. IN PARTNERSHIP AS; RE LAUNDRY & LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847, AFFILIATED WITH THE TEAMSTERS' UNION; RE GROUP OF EMPLOYEES 727

Natural Justice - Adjournment - Construction Industry - Construction Industry Grievance - Judicial Review - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

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Picketing - Construction Industry - Health and Safety - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross

picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128 648

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where congent reason for request not provided to Board -Proceeding adjourned *sine die*

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TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD..... 748

Practice and Procedure - Certification - Charter of Rights and Freedoms - Constitutional Law - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter -Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter - Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

PINKERTON'S OF CANADA LTD.; RE C.G.A; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP 673

Practice and Procedure - Certification - Construction Industry - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining

membership support as of application date - Board explaining its rationale for different practices in the construction industry - Board not departing from its usual practice in this case

AL GORDON ELECTRIC LIMITED; RE I.B.E.W., LOCAL 120; RE GROUP OF EMPLOYEES 637

Practice and Procedure - Certification - Membership Evidence - Timeliness - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union - Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed

ROYTEC VINYL CO., 732571 ONTARIO LTD. AND 732570 ONTARIO INC. C.O.B. IN PARTNERSHIP AS; RE LAUNDRY & LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847, AFFILIATED WITH THE TEAMSTERS' UNION; RE GROUP OF EMPLOYEES 727

Practice and Procedure - Colleges Collective Bargaining Act - Discharge - Unfair Labour Practice - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON 739

Practice and Procedure - First Contract Arbitration - Judicial Review - Stay - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE 749

Related Employer - Construction Industry - Remedies - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights

LANDMARK CONTRACTING LTD. AND LANDMARK STRUCTURES (ONTARIO) LTD.; RE B.S.O.I.W., LOCAL 721 660

Remedies - Construction Industry - Health and Safety - Picketing - Strike - Board asked to

declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128 648

Remedies - Construction Industry - Related Employer - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights

LANDMARK CONTRACTING LTD. AND LANDMARK STRUCTURES (ONTARIO) LTD.; RE B.S.O.I.W., LOCAL 721 660

Remedies - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A. 747

Stay - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of

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Stay - First Contract Arbitration - Judicial Review - Practice and Procedure - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE 749

Strike - Construction Industry - Health and Safety - Picketing - Remedies - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128 648

Termination - First Contract Arbitration - Judicial Review - Practice and Procedure - Stay - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE 749

Timeliness - Certification - Membership Evidence - Practice and Procedure - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union - Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not

entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed

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SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON 739

Unfair Labour Practice - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A. 747

Union Security - Collective Agreement - Union alleging that employer failed to remit to it dues that had been deducted from employees' pay pursuant to a collective agreement - Matter had originally been settled at arbitration on agreement of the parties that the dispute would be submitted as a complaint to the Board - Board dismissing complaint for lack of jurisdiction - Matter is one for a grievance arbitration board - Board's jurisdiction cannot be expanded by the parties' agreement

CARAVAN TRAILER RENTAL CO. LIMITED; RE I.A.M., LOCAL LODGE 2511 AND DISTRICT LODGE 717 647

0953-88-R Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John Knight and Lorraine Norris c.o.b. as **Agassiz Forestry/Environmental Services,** Respondents

Crown Transfer - Respondent partnership entering into a contract with the Crown in respect of a creel survey - Creel survey part of Crown's fisheries program and had been performed by Crown employees in the past - Board finding creel survey to be an "undertaking" within the Act that had been "transferred" to an "employer" - Respondent was an "employer" regardless of whether the partnership hired anyone to assist partners in performing the survey - Respondent bound by collective agreement between union and Crown

BEFORE: *Robert D. Howe,* Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong.*

APPEARANCES: *Alick Ryder* for the applicant; *R. C. Filion* and *Paul Drysdale* for the Crown in right of Ontario as represented by the Ministry of Natural Resources; no one appeared for the other respondents.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; June 14, 1990.

1. This is an application under the *Successor Rights (Crown Transfers) Act* (the "Act").

2. When no one appeared on behalf of the respondents John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services at 9:30 a.m. on June 4, 1990, which was the time set for the commencement of the hearing of this application on that date, the matter was recessed for thirty minutes as a matter of courtesy, in view of the possibility that their arrival might have been delayed. However, when no one had appeared on their behalf by 10:00 a.m., the hearing proceeded in their absence.

3. In the Spring of 1988, John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services were the successful bidders on Project No. 1 of Ministry of Natural Resources ("M.N.R.") Tender No. 621, which pertained to a creel survey that was to be conducted on Canal Lake, Cameron Lake, and Sturgeon Lake in the County of Victoria. On May 12, 1988, they entered into a contract with the Crown in respect of that creel survey.

4. As indicated in paragraph 27 of our decision dated July 18, 1989 in respect of File No. 1617-88-R (and five other files), which is reported as *Dunning Paving Limited*, [1989] OLRB Rep. July 714, Mr. Knight and Ms. Norris are partners (top) carrying on business as Agassiz Forestry/Environmental Services. (For ease of reference, that partnership will be referred to in this decision as "Agassiz", as it was in that decision.)

5. Under the terms of that creel survey contract, Agassiz was required to obtain for the Crown "accurate and precise written information respecting angler effort, angling success and fish harvest, including data for establishing biological characteristics of fish harvested during the period from May 14th until September 2nd inclusive in the year 1988 from the Canal Lake, Cameron Lake and Sturgeon Lake in the County of Victoria", and to "use a computer to enter, edit, validate, and correct" that information. The contract details the manner in which those operations are to be performed, and specifies what is to be supplied by Agassiz and what is to be supplied by the Crown.

6. Paul Drysdale, an official of the M.N.R. who appeared at the hearing pursuant to a summons served upon him by the applicant, advised the Board that the creel survey is part of the M.N.R.'s fisheries program, and that it has been performed by M.N.R. employees in the past.

7. The documentation submitted by Agassiz in support of its bid on that project indicates that "[i]n addition to the contractors, John Knight and Lorraine Norris, two more field crew personnel will be hired." However, in their August 10, 1988 reply to this application, Mr. Knight and Ms. Norris asserted that "[t]here were no employees hired and will be no employees hired to complete the above mentioned Creel Survey." The reply also suggests that their partnership should not be found to be an employer.

8. The Act provides, in part, as follows:

> 1.-(1) In this Act,
>
> (a) "bargaining agent" means an employee organization that has representation rights under the *Crown Employees Collective Bargaining Act* or a trade union or council of trade unions that is certified as a bargaining agent under the *Labour Relations Act*;
>
> (b) "Board" means the Ontario Labour Relations Board;
>
> (c) "collective agreement" means an agreement in writing between the Crown or an employer and an employee organization, trade union or council of trade unions covering terms and conditions of employment;
>
> (d) "Crown" means Her Majesty in right of Ontario;
>
> (e) "employer" means an employer other than the Crown;
>
> (f) "transfer" means a conveyance, disposition or sale;
>
> (g) "Tribunal" means the Ontario Public Service Labour Relations Tribunal;
>
> (h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.
>
> • • • •
>
> 2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.
>
> • • • •
>
> 4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,
>
> (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
>
> (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,
>
> any person, employee organization, trade union or council of trade unions concerned may apply

to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

(c) may determine the composition of the unit of employees referred to in clause (a);

(d) may amend, to such extent as the Tribunal or the Board considers necessary,

(i) any bargaining unit in any certificate issued to any trade union or council of trade unions,

(ii) any bargaining unit defined in any collective agreement,

(iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or

(iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

. . . .

9. The manner in which those provisions have been interpreted is described at length in our aforementioned decision dated July 18, 1989 in *Dunning Paving Limited*, *supra*, and in a subsequent decision dated October 20, 1989 (which has been reported under the same name in [1989] OLRB Rep. Oct. 1028) in which we dismissed a request for reconsideration of our earlier decision (and also granted three other applications). We do not propose to quote at length from those decisions, other than to note that the issue raised in Agassiz's reply concerning the meaning of the term "employer" in the context of this legislation was resolved in the following manner in our decision dated July 18, 1989 (in which we found each of the six contractors in those proceedings, including Agassiz, to be an "employer" within the meaning of section 2(1) of the Act):

54. We turn next to the issue of whether each of the contractors to whom those undertakings were transferred was an "employer" at the time of the transfer. The definition of "employer" contained in section 1(1)(e) of the Act is not of any assistance in resolving this issue as it merely indicates that the term "means an employer other than the Crown". As indicated by the aforementioned materials to which we were referred by Crown counsel, it is certainly possible to define the term "employer" as a person or firm that employs workers for remuneration. However, to construe the term in that manner in the context of this legislation could give rise to some very anomalous results. At the time a contractor enters into a seasonal contract with the Crown, s/he might well not have any employees as there would be no work for them to perform during the off season. The relatively small amount of work available at the start of some seasonal contracts (such as those involving garbage pick-up and disposal from a provincial park) could lead a contractor to initially perform all of the work personally and to defer hiring an assistant until later in the season when the amount of work to be done increases. Even in the context of non-seasonal work, a contractor such as Mr. Forbes might elect to personally perform all of the work covered by the contract until such time as illness or the need for a vacation prompts him to hire a replacement (or to make other arrangements for the performance of the contract during his absence). In each of those instances, accepting the aforementioned definition of "employer" would result in the contractor not being bound by the collective agreement because s/he would not be an "employer" at the time of the transfer of undertaking. Indeed, such a construction might well enable a contractor to defeat the purposes of the Act by merely deferring any hiring until after the commencement of the contract. On the other hand, a contractor who personally performs the work under the contract without any assistance, but who at the time of the transfer has employees working in another location (not covered by that contract) would likely be an "employer" on the basis of the aforementioned definition, while a con-

tractor without such employees would not. Furthermore, partnerships might obtain contracts covering a substantial amount of work and avoid the application of the Act by hiring no employees and having all of the work performed by the partners themselves. These and other such anomalies are avoided if the term "employer" is construed to be a label which the legislation uses to identify the individual, corporation, partnership, association, or other entity to which an undertaking has been transferred. The use of the term "employer" in the section 1(1)(c) definition of "collective agreement" also supports that interpretation. If, as contended by counsel for the Crown, a person or a firm without any employees is not an "employer", it would presumably follow that an agreement in writing which had been a "collective agreement" between an employer and a trade union would no longer be a "collective agreement" if the employer party ceased to employ anyone and, therefore, ceased to be an "employer". Such a result would be highly anomalous in the context of legislation that is clearly intended to provide stability in respect of bargaining rights. (See, generally, *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. March 279, paragraph 17ff.) Construing the term "employer" as a label used to identify the individual, corporation, partnership, association, or other entity to which an undertaking has been transferred is also reflective of the "fair, large and liberal construction and interpretation" which section 10 of the *Interpretation Act*, R.S.O. 1980, c.219, directs be given to every Act of the Legislature in order to "ensure the attainment of the object of the Act according to its true intent, meaning and spirit." (If, as submitted by Crown counsel, nothing in the collective agreement precludes management from performing bargaining unit work, this construction may result in the collective agreement having no material effect on the contractor's performance of the subject matter of the contract until such time as the contractor actually hires an employee. However, that is a matter for determination under the arbitration provision included in the collective agreement (or deemed to be so included by section 44 of the *Labour Relations Act*) and not by the Board in the context of the instant proceedings.)

10. Under section 2(1) of the Act, an employer is bound by the collective agreement between a bargaining agent and the Crown where an undertaking is transferred from the Crown to the employer and the bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking. Having regard to the breadth of the section 1(1)(h) definition of "undertaking", and to the principles set forth in the decisions cited above, we are satisfied that the aforementioned creel survey, which is part of the M.N.R.'s fisheries program and which is the subject matter of the contract in question between the Crown and Agassiz, is an "undertaking" within the meaning of the Act. It is also clear that through the tendering process which culminated in that contract, the undertaking has been "transferred", within the meaning of section 1(1)(f) of the Act, from the Crown to an "employer", regardless of whether or not Mr. Knight and Ms. Norris hired anyone to assist them in performing the creel survey. The evidence also establishes that, at all material times, the applicant had a collective agreement with the Crown in respect of employees employed in the undertaking to which these applications pertain. In this regard, we note that the collective agreement which is Exhibit #1 in these proceedings was in force between the Crown and the applicant from January 1, 1986 to December 31, 1988, and that M.N.R. employees covered by that collective agreement, or one or more of its predecessors, had performed the creel survey in the past.

11. This application was not contested by the Crown, but its counsel did make some brief submissions concerning the form of the relief which should be granted by the Board. Applicant's counsel also addressed the Board on that matter. Having regard to those submissions and to the Board's powers under section 4(1) of the Act, we hereby determine that all employees of John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services who performed the creel survey in Canal Lake, Cameron Lake, and Sturgeon Lake in the County of Victoria as per Project No. 1 of M.N.R. Tender No. 621, save and except those employees otherwise excluded from the collective agreement between the Management Board of Cabinet and the Ontario Public Service Employees Union, constitute a unit of employees appropriate for collective bargaining.

12. For the foregoing reasons, we hereby declare that the Crown has transferred an under-

taking to John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services; that at the time of the transfer the applicant had a collective agreement with the Crown in respect of employees employed in the undertaking; and that, as a result, John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services became bound by that collective agreement by virtue of section 2(1) of the Act.

DECISION OF BOARD MEMBER J. A. RUNDLE; June 14, 1990

For the reasons set forth in my decision dated July 18, 1989 in *Dunning Paving Limited*, [1989] OLRB Rep. July 714, I respectfully dissent from the majority decision. I would dismiss the application on the grounds that there has been no transfer of an undertaking, and on the further grounds that there is no evidence that Agassiz employed a worker or workers for remuneration so as to become an "employer" within my interpretation of that term in the context of this legislation. However, I agree that the relief granted by the majority would be appropriate if there had been a transfer of an undertaking to an employer within the meaning of the Act.

1954-89-R; 2071-89-U International Brotherhood of Electrical Workers, Local 120, Applicant v. **Al Gordon Electric Limited,** Respondent v. Group of Employees, Objectors; International Brotherhood of Electrical Workers, Local 120, Applicant v. Al Gordon Electric Limited, Respondent

Certification - Construction Industry - Practice and Procedure - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining membership support as of application date - Board explaining its rationale for different practices in the construction industry - Board not departing from its usual practice in this case

BEFORE: *G. T. Surdykowski,* Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine.*

APPEARANCES: *Bernard Fishbein* and *Don Thompson* for the applicant; *Bruce Binning* and *Al Gordon* for the respondent; *Paul Brooks* for the objectors.

DECISION OF THE BOARD; June 20, 1990

1. Board File No. 1954-89-R is an application for certification. Board File No. 2071-89-U is a complaint under section 89 of the *Labour Relations Act*. The matters are related and came on for hearing together.

2. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

3. The application for certification herein is one within the meaning of section 119 of the Act and is made pursuant to section 144(1).

4. There appears to be no dispute with respect to the manner in which the bargaining unit with respect to which this application is made should be described. Accordingly, and having regard to the provisions of section 144(1) of the Act, the finds that all electricians and all electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The application was mailed to the Board by registered mail on Sunday, November 5, 1989 and is, pursuant to section 113(2) of the Act and section 75(1) of the Board's Rules of Procedure, deemed to have been filed on that date. (It appears that the applicant found a convenience store which operates a postal facility which accepts and registers mail on Sundays.)

6. Counsel for the respondent expressed some concern with respect to the Sunday filing but was unable to point to anything which would prohibit an application for certification from being filed on a Sunday. Nor are we aware of anything which would either prohibit such a filing or deem it to have been made on some other day. On the contrary, section 113(2) of the Act stipulates that: "An application for certification...if sent by registered mail...shall be deemed to have been made on the date on which it was so mailed." Accordingly the Board has no discretion to find that any date other than November 5, 1989 is the date of application in this case.

7. The respondent, supported by the group of employees, objectors, strenuously argues that, in these circumstances, the Board should depart from its general practice in applications for certification in the construction industry of determining the applicant's right to be certified on the basis of the level of membership support for the applicant among only those employees in the bargaining unit on the date of application.

8. For the purposes of argument, the parties filed an agreed statement of fact with respect to this issue. The following pertinent facts are agreed:

(a) The respondent is an electrical contractor located in London which had obtained contracts to perform electrical contracting work at fifteen different sites as of November 5, 1989, the application date herein.

(b) The respondent's employees do not normally work on Saturdays or Sundays, and Sunday, November 5, 1989 was not a normal work day for them. The six employees of the respondent who were performing bargaining unit work on November 5, 1989 are listed on schedule A to the agreement of the parties. They were performing scheduled overtime work.

(c) There are sixty-four persons listed in schedule D to the agreement. On Friday, November 3, 1989, the last normal or regular work day for the respondent's employees prior to November 5, 1989, the vast majority of the persons listed in schedules A and D were employed by the respondent performing bargaining unit work. An unspecified number of them worked overtime on Saturday, November 4, 1989 as well.

(d) The vast majority of the persons on schedules A and D were also employed by the respondent performing bargaining unit work on Monday, November 6, 1989.

(e) The respondent has a large, relatively stable, work force. The applicant does not dispute that that work force has consisted of approximately sixty journeymen or apprentice electricians over the last three to four years, or that approximately one half of the

> persons listed in schedule D have been employed by the respondent for over two years, and approximately three quarters of them for over one year.

9. Counsel for the respondent submitted that the only difference in the *Labour Relations Act* between construction and non-construction applications for certification is that the Board need not, pursuant to section 11 9(2), have regard to any increase in the number of employees in the bargaining unit after the application was made for the purposes of its considerations under section 7 of the Act. Counsel questions the jurisdiction of the Board to apply different standards to construction and non-construction applications for certification except with respect to the matter addressed by section 119(2). Supported by counsel for the objectors, he argues that it would be a travesty, and contrary to the representation principle which underlies the *Labour Relations Act* for the Board to restrict itself to the date of application for purposes of making the necessary section 7 determinations in the circumstances of this application. He referred the Board to *Industrial-Mine Installations Limited*, [1968] OLRB Rep. May 217; *J.G. Fitzpatrick Construction Ltd.*, [1972] OLRB Rep. May 485, and *Colibri Construction Inc.*, [1986] OLRB Rep. July 931. Counsel suggested that the Board would be improperly fettering its discretion if it followed its general practice in construction applications without regard to the circumstances of this case.

10. Counsel for the respondent also seemed to suggest that it would be inappropriate to proceed with the application in accordance with the Board's general practice in construction applications for certification because this would result in the applicant being certified and lead to the respondent being unable to continue to compete in a considerable "non-union" market. In our view, there is no basis for this argument. The economic impact that unionization may have on anyone is not a consideration which is relevant in an application for certification.

11. Counsel for the applicant pointed out that there is nothing improper about the manner in which the union has proceeded. He referred the Board to *Smiths Construction Company*, [1984] OLRB Rep. March 521; *Galil Electric Company Ltd.*, [1986] OLRB Rep. July 959; *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *Cornwall Gravel Company Limited*, [1984] OLRB Rep. Dec. 1693; *Grove Drain Company Limited*, [1978] OLRB Rep. Nov. 994; *M & L Roofing Ltd.*, Board File No. 1242-78-R, January 8, 1979, unreported; *Thomas Fuller Construction (1958) Limited*, [1967] OLRB Rep. June 305; *Keystone Contractors Limited*, [1966] OLRB Rep. Feb. 821; and *Welcon Limited*, [1965] OLRB Rep. March 627. Counsel argued that the Board's practice favoured no one and could, as he submitted the cases he had cited illustrated, operate for or against an applicant for certification in any given case. Counsel asked rhetorically what would happen if there were more persons employed performing bargaining unit than usual? How many employees more or less would be sufficiently more or less for the Board to depart from its general practices?

12. In *Smiths Construction Company*, *supra*, the Board reviewed its general practice of considering only those persons employed in the bargaining unit on the date of application for purposes of making the necessary determinations under section 7 of the Act as follows:

> 8. The Act requires the Board to ascertain the number of employees in the bargaining unit at the time the application was made. There are no legislated criteria to guide the Board in this task, but, of course, there is really no difficulty in respect of those individuals both employed *and working* on the application date. The problem arises in respect of individuals who may, in some sense, be considered "employees" but who may not have been at work on the application date and may not return to work for some time thereafter, if at all. Employees on sick leave, maternity leave, long-term disability, workers' compensation, or layoff may fall into this latter category, as do the employees of a firm with a work force which fluctuates from day to day.
>
> 9. The construction industry poses special problems. Employment is necessarily transitory. Employees are quite literally "here today and gone tomorrow". A construction project is com-

> pleted in phases, so on any given day the mix of tradesmen on a site may be different. Moreover, there are always the exigencies of the market, collective bargaining difficulties, the weather, and the proverbial "snafu". Collective bargaining problems, jurisdictional disputes, controlled subcontracting arrangements, the availability of financing, and the dispersement of mortgage monies will effect the level of employment in any given trade at any particular time. So will the weather. A period of intense cold or rain will interfere with construction work and reduce the number of employees on the site until weather conditions improve. Likewise, bottlenecks, problems, or the possibility of missing a time limit or deadline may require the employment of more tradesmen to resolve the difficulties or get the project back "on the rails" even though such employment may only be on a short-term basis. For all of these reasons an employer's complement of employees may vary markedly from day to day so that, in the construction industry, it is very difficult to pin down with any precision those individuals who should be treated unequivocally as "employees" for the purposes of the *Labour Relations Act*. That is why, in the construction industry, the Board need not have regard for any increase in the employer's work force after the application for certification. And, of course, this inevitable fluctuation in the employee complement underlines the importance of the expeditious resolution of applications for certification. If there is any significant delay there will be a real possibility that any certificate ultimately issued will affect employees who were not even there when the application for certification was made. The union's support will have evaporated and bargaining rights will be largely academic. This possibility also exists in manufacturing enterprises but is minimized by the relative stability of employment over the time frame when a certification application is likely to be before the Board. Such is not the case in the construction industry.
>
> 10. To cope with these special problems in the construction industry, the Board has developed a particular rule of thumb as to the way in which it should ascertain the number of employees in the bargaining unit at the time the application was made. The Board determines the employee complement to be that which exists on the application date - fully realizing that the number may well be different the day before, or the day after and that, for example, if the application date is a rainy day, the union may find that its members are not at work so that its application may be dismissed. This "rule of thumb" has been accepted and applied by unions and employers in the construction industry for thirty years - and for a very practical reason: anything else would lead to costly and time-consuming litigation on every certification application causing delay which would severely prejudice the establishment of bargaining rights purportedly guaranteed by the statute. If time is of the essence generally in labour relations, that maxim is particularly true in the construction industry. That is why the Act expressly empowers the Board to issue certificates without a hearing where it considers it advisable to do so, and, as we have already noted, the Board need not have regard for a build-up of the work force after the application is made. Technically, a union may conclude a collective agreement even though there are no employees at the time it is entered into (see section 121), although as a practical matter, if there are no employees, there may be no bargaining leverage to induce an employer to do so.
>
> [emphasis supplied]

(See also *City Plumbing (Kitchener) Limited*, [1987] OLRB Rep. June 810 at paragraph 6; *Cornwall Gravel Company Limited*, *supra*, at paragraph 8; *Colibri Construction Inc.*, *supra*). In construction industry applications for certification, the Board has only very rarely departed from this practice of considering only the employees of the respondent employer who were at work on the date of application. *M & L Roofing Ltd.*, *supra*, *Welcon Limited*, *supra*, *Keystone Contractors Limited*, *supra*, and *Thomas Fuller Construction (1958) Limited*, *supra*, are examples (though far from the only ones) of applications for certification in the construction industry which have been dismissed because there were fewer than two employees in the bargaining unit (as required by section 6(1) of the Act) on the date of application because of inclement weather and notwithstanding that there were more than two such employees immediately before and after the date of application.

13. In contrast, in non-construction applications for certification, the Board's general practice is to include all employees who are either at work in the bargaining unit on the date of application, or, who, though not at work on the date of application, had worked at least one day in the

thirty day period prior to the application *and* worked or are expected to work in the bargaining unit during at least one day within the thirty day period following the date of application for purposes of its section 7 considerations (i.e. to "30-30" rule). There is also the well known "seven week rule" which is used by the Board to distinguish between full-time and part-time employees where that is an issue (see generally Sack, Jeffrey, Q.C. and Michael Mitchell, Ontario Labour Relations Board Law and Practice, (Butterworths, Toronto, 1985) at pages 122 to 123 and 155 to 159).

14. Because the construction industry tends to be very craft or trade oriented and bargaining units in it are generally described as craft or trade units, the Board has also focused, particularly in recent years, on the date of application for the purposes of determining the trade in which employees of a respondent employer were working on the date of application. In *Gilvesy Enterprises Inc.*, *supra*, at paragraph 16, the Board reviewed its practice prior to 1987 in that respect:

> 16. In applications for certification in the construction industry, a person must be at work on the date of application in order to be included in the bargaining unit for purposes of "the count" (see for example, *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. March 521). In addition, an individual must be doing bargaining unit work in order to be included in it. In the past, the Board has determined whether an employee is in the bargaining unit by looking at the work that an employee did during the majority of the time on the date of application (see for example *O.J. Gaffney Limited*, [1964] OLRB Rep. Aug. 233; *McNamara Construction of Ontario Limited*, [1964] OLRB Rep. Dec. 419; *Nedean Forming Company Limited*, [1965] OLRB Rep. May 100; *Clairson Construction Company Limited*, [1968] OLRB Rep. Apr. 126; *Deer-Mine Services Limited*, [1971] OLRB Rep. June 336; *George and Asmussen Limited*, [1971] OLRB Rep. Oct. 683). Even when an employee was doing the work of one classification or craft on the date of application but has previously been engaged in doing the work of several trades or crafts but at the same wage rate, the Board has long been willing to examine a representative period of time prior to the date of application to ascertain what work an individual spends the majority of his time doing and whether or not he/she is properly included in the bargaining unit. (See for example, *Johnson-Keiwit Subway Corporation*, [1966] OLRB Rep. June 182; *Mal-Nicholson Limited*, [1970] OLRB Rep. March 1448; *Heath Construction Inc.*, [1977] OLRB Rep. Oct. 691; *Watcon Inc.*, [1981] OLRB Rep. Dec. 1840; *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1793; *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Di Marco Plumbing & Heating Company Limited*, [1985] OLRB Rep. May 659). It is evident from the decided cases that the "representative period" will vary in length according to the circumstances. For example, the Board has looked at periods of ten days (*Heath Construction Inc.*, *supra*); fifteen days (*J. M. Chartrand Realty Ltd.*, [1978] OLRB Rep. May 423), two weeks (*Di Marco Plumbing & Heating*, *supra*) and one month (*Des-Build Developments Ltd.*, *supra*). It has also be suggested that the Board may look to the primary reason for which the employee was hired to determine his classification (*Pre-Con Murray*, [1965] OLRB Rep. Jan. 1003) although this test has only been applied in limited circumstances where the evidence of what the employee was doing prior to and on the date of application was inconclusive of the issue. (See, *Des-Build Development Limited*, *supra* and *Dufresne Piling Co. (1967) Ltd.*, *supra*).

(See also *E & E Seegmiller Limited*, *supra*, at paragraph 12). At paragraph 21, the Board went on to conclude that:

> 21. In making our determination, we consider the work performed by the persons whose status was in dispute in these proceedings both on the date of application and during a period prior to that date. However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work

> covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" has tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create, as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:
>
> (a) whether the person was employed by the respondent and at work on the date of application; and
>
> (b) if so, the work that that person spent the majority of his time doing on the date of application; or
>
> (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

(See also *E & E Seegmiller Limited*, *supra*, at paragraph 17). Since then, the Board has consistently applied the tests suggested at paragraph 21 of *Gilvesy Enterprises Inc.*, *supra*, and at paragraph 17 of *E & E Seegmiller Limited*, *supra*. (See *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682, among others).

15. Section 102(13) of the Act specifies that the Board is the master of its own practices and procedures, though of course this is subject to the specifics of any applicable legislation and the requirements of natural justice and fairness. As illustrated above, the Board has developed a number of practices (or policies or "rules of thumb") which it uses in certification proceedings. These have been developed over time with a view to decreasing repetitious or fruitless, but often lengthy and expensive litigation before the Board. In fashioning these practices in certification proceedings, the Board strives to create as certain, fair, and expeditious a means as possible for making the determinations necessary in such matters. Through its practices, the Board tries to be responsive to the real world of labour relations. There will of course be limits or exceptions to every practice. Indeed, blind adherence to a practice or policy set in advance may constitute jurisdictional error (see, for example, *Re: Testa and Worker's Compensation Board of British Columbia*, (1989) 58 D.L.R. 676 (B.C. Court of Appeal) at pages 685 to 687). On the other hand, it would do nothing to further harmonious labour relations in this province to abandon practices which have evolved over and stood the test of time in thousands of applications for certification without some compelling reason(s) to do so. On the contrary, to approach them differently would make them less than practices and would create undesirable uncertainty. It would also tend to encourage unnecessary litigation and involve the Board in the fruitless exercise of constantly reinventing the labour relations wheel. In short, there is a balance to be struck. Although the Board should not abandon tried and true practices, it must be willing to examine their applicability in the circumstances of particular cases.

16. *Colibri Construction Inc.*, *supra*, was a construction industry application for certification in which the Board demonstrated its willingness to consider the applicability of its general practices of not taking into account an expected increase in the number of employees and of focusing on the date of application for the purposes of ascertaining the number of employees in the bargaining unit, although it declined to depart from those practices in the circumstances of that case.

17. *J. G. Fitzpatrick Construction Ltd.*, *supra*, was also a "build up" case. There the Board found it appropriate to consider the increase in the number of employees in the bargaining unit

after the application for certification had been made (as it had the discretion to do under what is now section 119(2) of the Act) and, in the circumstances, exercised its discretion, under what is now section 7(2), to order a representation vote notwithstanding that the applicant had filed membership evidence with respect to all four employees in the bargaining unit on the date of application.

18. In *Industrial-Mine Installations Limited*, *supra*, the applicant filed membership evidence with respect to twenty-one of the respondent's twenty-four employees who were performing bargaining unit work on the date of application. However the Board considered the fact that those twenty-four employees had been hired on a temporary basis to fill in for the respondent's regular work force of over forty employees who were not at work because of a regularly scheduled Christmas shut down. In those circumstances, the Board (by majority of decision) concluded that:

> 9. This last class of case has given us some concern in the present situation. After much anxious consideration, however, we have come to the conclusion that in the present case we ought to take into account the peculiar circumstances which here obtain, namely, the existence of a reasonably permanent (for the construction industry) work force, together with the shut-down, the reasons therefor and the fact that it is an occurrence which happens yearly with this particular respondent. *In other words, the representation principle must in this case take precedence over the short-term employment features of the construction industry.* Viewed in another way, if this is to be regarded as a case involving build-up, then, in our opinion, the peculiar circumstances of this case make it one in which regard should be had to an increase in the number of employees in the bargaining unit after the application was made. It may well be that the construction industry division will have to review its policy of dismissing applications in circumstances where, because of the weather or some other unusual occurrence, there are no employees in the bargaining unit on the date of the making of the application.
>
> 10. In reaching the above conclusions, we have not overlooked the argument that our decision might introduce a certain element of doubt in an otherwise straight-forward policy and that this in turn may on occasion lead to delay in the disposition of some applications for certification in the construction industry. In our view, however, such considerations must give way in a proper case such as the present where, because of the peculiar and unique circumstances, an inflexible application of a policy would produce an obviously inequitable result.
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> [emphasis added]

19. In neither *J. G. Fitzpatrick Construction Ltd.*, *supra*, nor *Industrial-Mine Installations Inc.*, *supra*, did the Board depart from its practice of focusing on the date of application for the purposes of making the determinations under what is now section 7 of the Act. While this does not mean that it would never be appropriate to do so, it does demonstrate that the Board's response in cases in which it is satisfied that the circumstances are such that a strict application of the date of application "rule of thumb" would lead to an inequitable result will generally, and quite appropriately in our view, be to direct the taking of a representation vote even if the applicant trade union has filed evidence of membership with respect to more than fifty-five per cent of the persons who were employees in the bargaining unit on that date.

20. In our view, there are legitimate reasons for having practices or policies in the construction industry that are different from those for non-construction matters. The differences between construction and non-construction situations have been recognized in the *Labour Relations Act* itself. Sections 117 to 151 of the Act apply only to the construction industry, including a separate certification scheme and a different collective bargaining scheme, particularly in the industrial, commercial and institutional sector of the construction industry. The Board's Rules of Procedure also establish a different process for dealing with construction matters. The Board, as the jurisprudence cited above illustrates, also recognizes the practical differences between a construction industry and other industries (in that regard see also *Shearwall Forming (East) Ltd.*, [1989] OLRB

Rep. Dec. 1254 and *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254 and [1989] OLRB Rep. March 234). In our view, there is nothing to prevent the Board from developing different practices for different types of cases. Indeed, it would be inappropriate to do otherwise.

21. We are not persuaded that the Board should depart from its practice of focusing on the date of application for the purposes of ascertaining the number and identity of employees in the bargaining unit in the circumstances of this application. Because the applicant has not filed membership evidence with respect to more than fifty-five per cent of the employees in the bargaining unit at the time the application was made (for those purposes we assume that schedule A to the agreement of the parties referenced in paragraph 8 above is an accurate list of employees in that respect), the applicant would at best, in the absence of its request for relief under section 8 of the Act, be entitled to a representation vote. In all the circumstances, particularly the applicant's allegations that the respondent has contravened the Act in a manner such that the true wishes of the employees cannot be ascertained and that it should therefore be certified pursuant to section 8, we find it inappropriate to either comment on or make any determination with respect to whether or not a vote should be taken until we have had the benefit of the evidence and representations of the parties with respect to all matters in issue in the application.

22. The Registrar is directed to schedule this matter for hearing as soon as possible. To assist the Registrar in that respect, the Board finds it appropriate to direct the parties to provide her with their estimate of the number of days the hearing will take and their available dates for hearing to the end of December 1990 within 14 days of the date hereof. If the parties, or any of them, fail to provide that information as directed, the Registrar may schedule the application to be heard on such dates as she considers appropriate and without any further consultation with the parties.

1887-88-R Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and The Board of Governors of **Algonquin College of Applied Arts and Technology,** Respondents

Colleges Collective Bargaining Act - Crown Transfer - Crown contracting out operation and maintenance of campground and access point in provincial park to community college - Board having no jurisdiction to issue a declaration under the *Crown Transfers Act* where transfer is from the Crown to a community college - Application dismissed

BEFORE: *Robert D. Howe,* Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong.*

APPEARANCES: *A. Ryder* and *Ivor Oram* for the applicant; *R. C. Filion* for Crown in right of Ontario as represented by the Ministry of Natural Resources; *Patricia G. Murray* for the Board of Governors of Algonquin College of Applied Arts and Technology.

DECISION OF THE BOARD; June 18, 1990

1. This application under the *Successor Rights (Crown Transfers) Act* (the "C.T.A.") pertains to the operation and maintenance of Achray Campground and Sand Lake Gate Access Point

in Algonquin Provincial Park. The application was filed after the Ministry of Natural Resources (the "M.N.R.") entered into an agreement in the Spring of 1988 with the Board of Governors of Algonquin College of Applied Arts and Technology (the "College") under which the M.N.R. contracted out to the College the operation and maintenance of that campground and access point.

2. At the commencement of the hearing of this application on June 11, 1990, counsel for the applicant advised the Board that, although he did not have instructions to withdraw the application, he had serious reservations about the Board's jurisdiction to grant it as he was unable to point to any statutory provision covering a transfer from the Crown to a community college.

3. In her submissions on behalf of the College, Ms. Murray contended that the Board has no jurisdiction in this case to issue a declaration under the C.T.A. because the College's collective bargaining relationships are governed exclusively by the *Colleges Collective Bargaining Act* (the "C.C.B.A."), and the C.T.A. does not apply. She also submitted, in the alternative, that if the Board does have jurisdiction under the C.T.A., in the circumstances of this case it should decline to issue a declaration.

4. Counsel for the Crown expressed complete support for the foregoing submissions.

5. In his reply, Mr. Ryder indicated that his only disagreement with Ms. Murray's submissions pertained to her alternative argument. It was his position that the Board has no jurisdiction to decline to issue a declaration if there has been a transfer of an undertaking within the meaning of the C.T.A.

6. Having regard to the submissions of counsel and to the pertinent legislative provisions, we are unanimously of the view that, in the circumstances of this case, the Board has no jurisdiction to grant a declaration under the C.T.A. The C.T.A. clearly contemplates that after there has been a transfer of an undertaking from the Crown to an employer within the meaning of that legislation, the *Labour Relations Act* will apply to the bargaining agent that has representation rights in respect of the employees employed in the undertaking. In this regard, section 6 of the C.T.A. provides, in part, as follows:

> 6.- (1) Notwithstanding any other provision of this Act,
>
> . . .
>
> (b) an employee organization shall not exercise representation rights or act as bargaining agent in respect of employees employed in an undertaking transferred from the Crown to an employer unless the employee organization qualifies as a trade union or council of trade unions under the *Labour Relations Act*.
>
> (2) Except as otherwise provided in this Act, where an undertaking is transferred from the Crown to an employer, the *Labour Relations Act* applies to a bargaining agent that has representation rights in respect of the employees employed in the undertaking and to the employees and where an undertaking is transferred from an employer to the Crown, the *Crown Employees Collective Bargaining Act* applies to a bargaining agent that is certified as a bargaining agent in respect of the employees employed in the undertaking and to the employees.

7. The legislation that applies to the applicant in its capacity as bargaining agent for community college employees is the *C.C.B.A.*, which contains extensive provisions regarding negotiations, fact finding, voluntary binding arbitration, final offer selection, agreements, the Colleges Relations Commission, strikes and lock-outs, and representation rights in the context of Ontario's community colleges. Of particular relevance to the instant case are the following provisions:

1. In this Act and in the Schedules,

(a) "agreement" means a written collective agreement between the Council on behalf of the employers and an employee organization covering terms and conditions of employment negotiable under this Act;

(b) "bargaining unit" means the academic staff bargaining unit of employees or the support staff bargaining unit of employees set out in Schedules 1 and 2;

• • •

(e) "Council" means the Ontario Council of Regents for Colleges of Applied Arts and Technology;

(f) "employee" means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;

(g) "employee organization" means an organization of employees formed for the purpose of regulating relations between the employer and employees under this Act, but does not include such an organization of employees that discriminates against any employee because of age, sex, race, national origin, colour or religion;

• • • •

2.-(1) This Act applies to all collective negotiations concerning terms and conditions of employment of employees.

(2) No such collective negotiations shall be carried on except in accordance with this Act.

• • • •

67.-(1) The bargaining units set out in the Schedules are the units for collective bargaining purposes under this Act.

(2) The employee organization that is party to the agreement covering the academic staff bargaining unit or the support staff bargaining unit on the 18th day of July, 1975 shall be deemed to have been granted bargaining rights in relation to such bargaining unit on the 18th day of July, 1975.

8. The Schedules to the C.C.B.A. contain descriptions of two statutorily mandated bargaining units. Schedule 1 describes the "academic staff bargaining unit", and Schedule 2 describes the "support staff bargaining unit". It is common ground among the parties that the work under the agreement in question was performed by "students" who fall within one of the eleven exclusions listed in Schedule 2, and who, therefore, were not covered by the "support staff" collective agreement. (If they had been employed by the M.N.R. to perform the work in question, they would similarly have been excluded from the collective agreement between the Crown and the applicant as a result of their student status.) However, if that work had been performed by College employees not excluded from Schedule 2 of the C.C.B.A., the "support staff" collective agreement would have applied to them. Thus, the Board's lack of jurisdiction under the C.T.A. in respect of transfers of undertakings from the Crown to community colleges does not create a collective bargaining void.

9. In view of our conclusion that we have no jurisdiction to grant a declaration under the C.T.A. in respect of this alleged transfer of an undertaking from the Crown to the College, it is unnecessary to deal with the alternative argument advanced on behalf of the College.

10. For the foregoing reasons, this application is hereby dismissed.

2899-89-U Local Lodge 2511 and District Lodge 717, International Association of Machinists and Aerospace Workers, Complainant v. **Caravan Trailer Rental Co. Limited,** Respondent

Collective Agreement - Union Security - Union alleging that employer failed to remit to it dues that had been deducted from employees' pay pursuant to a collective agreement - Matter had originally been settled at arbitration on agreement of the parties that the dispute would be submitted as a complaint to the Board - Board dismissing complaint for lack of jurisdiction - Matter is one for a grievance arbitration board - Board's jurisdiction cannot be expanded by the parties' agreement

BEFORE: *Michael Bendel,* Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague.*

APPEARANCES: *Joseph Atkinson* for the complainant; *W. A. Treleaven* for the respondent.

DECISION OF THE BOARD; June 5, 1990

1. This is a complaint under section 89 of the *Labour Relations Act*, in which it is alleged that the respondent has violated section 43 of the Act. Section 43 reads as follows:

> 43.-(1) Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.
>
> (2) In subsection (1), "regular union dues" means,
>
> (a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union; and
>
> (b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union.

2. The complainant alleges that the respondent has failed to remit to it dues that have been deducted from employees' pay pursuant to a collective agreement. The respondent claims, among other things, that the collective agreement permits employees to revoke their authorization for dues deductions, and that the employees in the unit, who have certain disagreements with the complainant, have all revoked their authorizations. In written submissions filed with the Board, the respondent has argued that the real dispute is between the complainant and the employees, and that the employees should therefore be given notice of these proceedings.

3. The complainant had referred a grievance on this issue to arbitration. The grievance was settled, however, with the assistance of a grievance settlement officer from the Ministry of

Labour, on the agreement of the parties that the dispute would be submitted as a complaint to the Board.

4. At the hearing, the Board asked the parties to address the question whether it had jurisdiction under the Act to deal with this complaint. The parties stated that they had agreed to the settlement of the grievance on the basis that it would be brought before the Board.

5. The Board rendered an oral decision at the hearing dismissing the complaint for lack of jurisdiction, and stated that a written decision would follow.

6. The obligation created by section 43 of the Act is the obligation to include an appropriate dues deduction provision in collective agreements. It does not, however, create the further obligation to comply with dues deduction provisions. Other sections of the Act do that. Section 50 of the Act, in particular, requires the parties to a collective agreement to observe its terms, and section 44 indicates that arbitration is the proper mechanism for resolving disputes about compliance with collective agreements. This dispute between the parties has to do with the interpretation or application of the collective agreement, and falls squarely within section 44 of the Act. Except in the construction industry, where special provisions apply, the Board has no jurisdiction to act as a grievance arbitration board.

7. It is irrelevant that the parties have agreed that the Board should deal with this dispute. The Board is a creature of statute and its jurisdiction is limited to those types of disputes assigned to it by statute. Its statutory mandate does not empower it to resolve whatever type of labour dispute the parties might have agreed to refer to it. Its jurisdiction cannot be expanded by the parties' agreement.

8. It was for these reasons that we decided that this complaint was not within the Board's jurisdiction and had to be dismissed.

0653-90-U Horton CBI, Limited, Applicant v. Leo E. Evans, Joe L. Da Silva, Terrance R. McGuire, and Sanford Jones, Respondents v. The International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 128, Intervener

Construction Industry - Health and Safety - Picketing - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

BEFORE: *G. T. Surdykowski,* Vice-Chair.

APPEARANCES: *Donald B. Francis* and *Bruce Wallace* for the applicant; *M. A. Church, Terry McGuire, Sanford Jones* and *Joe Da Silva* for the respondents; *M. A. Church* and *Steve Silversides* for the intervener.

DECISION OF THE BOARD; June 11, 1990

1. At the hearing of this application, "The International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 128" was added as an intervener in these proceedings.

2. This is an application, under section 135 of the *Labour Relations Act*, in which the applicant alleges that the respondents have engaged in conduct which constitutes an unlawful strike. Upon considering the material facts, which were not in dispute, and the representations of the parties, the Board, orally and at the hearing:

a) declared that the respondents have engaged in an unlawful strike, contrary to the provisions of the *Labour Relations Act* by refusing to cross the picket line established by The International Brotherhood of Electrical Workers, Local 402;

b) directed the respondents, and anyone having notice or knowledge of the declaration and directions herein, to cease and desist from engaging in any unlawful strike activity with respect to the applicant;

c) directed that all persons having notice or knowledge of the declaration and directions herein cease and desist from counselling, procuring, supporting, encouraging, or threatening any unlawful strike with respect to the applicant;

d) directed that the respondents and anyone having notice or knowledge of the declaration and directions herein cease and desist from performing acts which they know or ought to know will, as a probable or reasonable consequence thereof, cause or result in an unlawful strike with respect to the applicant;

e) directed the Registrar to give notice of the declaration and directions herein to The International Brotherhood of Electrical Workers, Local 402 by sending a copy of this decision to it, and further directed The International Brotherhood of Electrical Workers, Local 402 to give notice of the declaration and directions herein to its members forthwith upon the receipt thereof.

3. The Board gave brief oral reasons for its decision as aforesaid at the hearing as follows.

4. The material facts were not in dispute. In essence the respondents and intervener accepted as correct the allegations completed in the application as supplemented by counsel at the hearing. They also candidly conceded that these facts established the existence of an unlawful strike with respect to the applicant. However, they argue that the respondents actions were, in the circumstances, justified, and that the Board should exercise its discretion to not make any directions or orders with respect thereto.

5. The facts upon which the respondents and intervener rely were not disputed by the applicant. The International Brotherhood of Electrical Workers, Local 402 (the "IBEW"), which is in a legal strike position with respect to work in the industrial, commercial and institutional sector of the construction industry in Ontario, first established a picket line at what is presently the only construction entrance to the Canadian Pacific Forest Products Newsprint Modernization

Project (the "Project") in Thunder Bay and on which the applicant is a subcontractor, in May, 1990. This picket line was taken down after a few days on the understanding, which is a common one in such circumstances, that the work of electricians would not be done on the Project. Subsequently, the general contractor and owner of the Project decided to speed some of the work on it up and reactivatd a crane which had been used by members of the IBEW to do their work. It is not apparent that any electricians work was (or is) being done as a result (certainly neither the applicant nor the respondents were involved in doing any) but the IBEW reacted to this by re-establishing the picket line. This picket line was sporadic at first but has been up consistently since May 22, 1990. Since May 22, 1990, the picket line has grown increasingly militant and persons, including the respondents, who have sought to cross it have been threatened with harm to their persons or property. The respondents, who are members of the intervener, have attempted, at the urging of the intervener, to cross the IBEW picket line, but have thought it prudent not to force the issue in the face of the threats directed against them both at the picket line and elsewhere. In the result, they have not reported for work as scheduled by the applicant. In that respect, it is worth noting that Thunder Bay is a "union town" and a relatively small community in the sense that members of the various of the construction trade unions tend to know each other.

6. Although counsel for the respondents and intervener conceded that the *Occupational Health and Safety Act* R.S.O. 1980 Chapter 321 had not been formally invoked, he urged the Board to accept that the respondents had not reported for work because they had reason to believe that they would endanger themselves if they did, or attempted to do, so and that by analogy to the *Occupational Health and Safety Act* their actions were therefore justified.

7. I gave careful and serious consideration to the representations of the respondents and intervener. However, while it may be that there are circumstances in which the Board will decline to issue the usual cease and desist directions even though an unlawful strike exists, I was constrained to conclude that it was not appropriate to refrain from doing so in this case.

8. Strikes and picket lines are not tea parties. Emotions run high in such situations. They give rise to enormous tensions between people, particularly in circumstances where some people are engaged in a lawful strike and others, who know them and who have some sympathy for their position, are not. However, as counsel conceded, the sorts of things which have been said on the IBEW picket line (and elsewhere) in this case are not uncommon on construction picket lines. Notwithstanding that, actual violence on picket lines continues to be the exception rather than the rule. While I in no way belittled the concerns of the respondents, I found nothing in the facts before me which would justify their actions in a legal sense or which made it appropriate to not grant the relief sought. In the circumstances, I did, however, find it appropriate to try to ensure that notice of the Board's determinations herein came to the attention of the IBEW and its members.

9. Finally, I observe that this application illustrates the wisdom of the *Sarnia Construction Association*, [1982] OLRB June 922 approach to situations in the construction industry where striking employees are picketing the job site on which other employees are not in a legal strike position, and where the work of the striking employees is not being performed and the employers being adversely affected are not connected with the negotions relating thereto. Though criticized by some, this approach has served the construction labour relations community well and has been generally accepted by it.

2336-89-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Johnson Controls Ltd.,** Respondent v. Group of Employees, Objectors

Certification - Intimidation and Coercion - Membership Evidence - Employer arguing that union "bought" memberships by providing valuable merchandise to employees who signed membership cards and paid $1.00 - Employer arguing that vote required to remove "cloud" or that all cards should be disregarded - Board determining that such allegations must be made in a timely and particularized manner - Giving out of merchandise not condition of signing a card - Union's conduct did not cross line from salesmanship to buying of memberships - Certificate issuing

BEFORE: *S. A. Tacon,* Vice-Chair, and Board Members *W. H. Wightman* and *P. V. Grasso.*

APPEARANCES: *Barrie Chercover, Wayne McKay, Christine O'Neill* and *C. Meneghini* for the applicant; *F. G. Hamilton, Rick Miggens* and *Mike Barnanowski* for the respondent; *William S. Challis* (for January 19, 1990 only), *Elvira Geroly, Randall Ryan* and *Lorraine Sinclair* for the objecting employees.

DECISION OF S. A. TACON, VICE-CHAIR AND BOARD MEMBER P. V. GRASSO; June 11, 1990

1. This is an application for certification in which a hearing was scheduled to deal with allegations that two named individuals did not pay at least $1.00 on their own behalf in connection with their membership applications. Further, the Board, in a written ruling dated April 23, 1990, permitted a line of questioning by the respondent's counsel with respect to allegations raised in counsel's letter of February 27, 1990 that the applicant "bought" memberships by providing valuable merchandise and food to employees who signed membership cards and paid $1.00.

2. It is first useful to deal with several matters resolved by the parties as a result of discussions with the Board Officer. With respect to those matters, the parties waived their right to a formal hearing.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act.*

4. Having regard to the agreement of the parties, the Board finds that the following constitutes a unit of employees appropriate for collective bargaining:

> all employees of the respondent in Tillsonburg, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period or on a co-operative training basis with a school, college or university, and security guards.
>
> *Clarity Note*: For purpose of clarity, "supervisors" include foremen and co-ordinators, and "technical staff" includes quality control staff, laboratory staff and line technicians.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was

made, were members of the applicant on January 9, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A statement of desire or petition was filed in opposition to the applicant. However, the Board need not deal further with that petition as the overlap between the number of persons signing the petition who had previously signed membership cards in support of the applicant was insufficient to persuade the Board to exercise its discretion to direct a representation vote even if the petition was found to be voluntary.

7. The Board next turns to the allegations. Eleven witnesses testified, including those summonsed by the Board in accordance with its usual practice in such circumstances. Documentary material was also tendered in evidence. The Board has considered the usual factors in assessing the credibility of the witnesses including the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, and their demeanour. In reaching its findings of fact, the Board has weighed the testimony of the witnesses, including their relative credibility, in the context of the documentary material and what appears to the Board to be reasonably probable in all the circumstances.

8. The Board notes that the issue of credibility is critical to the determination of the issues in the instant case. It is to be expected that witnesses testifying months after the events transpired would not likely recall those matters in their entirety even where such persons are recounting events to the best of their ability. In the instant case, the Board is not persuaded of the reliability of the testimony of N. Kiraly and S. McKibbon where their evidence conflicts, on critical aspects relating to the circumstances in which each signed a membership card, with the testimony of those testifying on behalf of the applicant (including the collectors and Form 9 declarant).

9. In the context of the foregoing comments, the Board next briefly sets out the relevant facts, dealing first with the card of N. Kiraly and then that of S. McKibbon. The factual findings do not cover all events touched on in the hearing, rather the Board has focused on those matters relevant to the issues as described in paragraph 1 above. For convenience, the applicant is referred to as the "union" or the "CAW".

10. N. Kiraly, an employee at the respondent's plant in Tillsonburg, was invited to an organizing meeting at Covey's Restaurant (and Hotel) on November 23, 1989 by a friend and fellow employee, T. Mulhearn. N. Kiraly attended as she had some questions about the CAW and was informed that union staff organizers would be present to respond to her concerns. She arrived shortly after 7:00 a.m. following completion of her night shift at the plant. Seated at the table with with her were C. Grant (a CAW organizer), M. Shepard, K. Hodgson and T. Mulhearn (T. Mulhearn left before the card signing however). As well, seated at the next table were B. Jeffries, W. McKay (a CAW organizer), R. Peddie and another unidentified person. All but C. Grant and W. McKay were employees of the respondent's plant.

11. N. Kiraly discussed her concerns primarily with M. Shepard and B. Jeffries; C. Grant participated in the conversation as well but to a lesser extent. Topics raised included holidays, seniority, health and safety, future wage demands, and scheduling on long weekends. The discussions focused on N. Kiraly's particular interests and went on for quite some time. At approximately 9:30 a.m., N. Kiraly decided to sign a membership card. The Board does not accept her testimony that she sought to postpone her decision to Sunday but was "talked into" signing. C. Grant produced a blank membership card. The card was completed; N. Kiraly and M. Shepard signed at the appropriate places - N. Kiraly as applicant and M. Shepard as collector.

12. An initiation fee of $1.00 is required in connection with the application for membership. N. Kiraly produced a $2.00 bill from her wallet. M. Shepard asked W. McKay for change, W. McKay had none. In turn, W. McKay asked the others present if any had change for the $2.00 bill. When no one else had change, W. McKay took the $2.00 bill and the card, indicating that he had the correct change in his room. W. McKay was staying at the hotel and had just received a telephone call from T. Heller (a CAW representative who had initiated the current campaign) which W. McKay had had transferred to his room. B. Jeffries had left the restaurant to take the telephone call from T. Heller and was in W. McKay's room when he appeared with the card and the $2.00 bill. W. McKay got the $1.00 change (a "loonie"), spoke with T. Heller and then returned to the restaurant. W. McKay placed the $1.00 coin in front of N. Kiraly.

13. N. Kiraly continued to discuss her various problems and concerns. During the morning, she smoked first her own cigarettes and then had borrowed cigarettes from M. Shepard and others. About 10:30 a.m., when M. Shepard and R. Peddie were about to leave, N. Kiraly said she didn't have enough money to buy cigarettes. M. Shepard offered to lend her $5.00 for cigarettes; she was to repay him. M. Shepard and R. Peddie left the restaurant as did most of the others. N. Kiraly remained to continue to talk to C. Grant for another hour or thereabouts, finally leaving at 11:30 a.m. or so. M. Shepard forgot about the loan until the Board investigation and did not ask to be paid back. As is evident in the factual findings, the Board does not accept N. Kiraly's version of events wherein N. Kiraly sought to portray herself as having been "pressured into" signing and then M. Shepard as having loaned her $5.00 to pay for the card. That story is not plausible in the circumstances, particularly since N. Kiraly discussed her problems at the plant for over two hours before signing and then continued for two hours afterwards, even when her fellow workers had left and only C. Grant remained. It is not that the union witnesses outnumbered N. Kiraly and therefore were more credible; rather, it is that the testimony of the union witnesses - some of whom only witnessed minor aspects of the events - when taken together comprise a scenario which is compelling.

14. In investigating N. Kiraly's non-pay, the Board Officer met with N. Kiraly in accordance with the Board's usual practice. N. Kiraly mentioned this to T. Mulhearn who informed M. Shepard. During a shift, M. Shepard approached N. Kiraly and mentioned the $5.00 loan was for cigarettes, not the card. N. Kiraly asserted the money was for the card. The conversation lasted only a few minutes. As well, B. Jeffries (who had been informed by M. Shepard of the Board Officer meeting with N. Kiraly) spoke with N. Kiraly about the $5.00 loan. Again, the conversation was brief. When B. Jeffries and M. Shepard telephoned W. McKay to apprise him of N. Kiraly's story, they were instructed to refrain from further contact with N. Kiraly and did so.

15. The facts with respect to S. McKibbon's card may be stated quite briefly. L. Robinson and G. Shepherd arrived at the Royal Tavern on Thursday, October 26, 1989 after work. The Royal Tavern was frequented by many employees at the respondent's Tillsonburg plant after their shifts ended. S. McKibbon was already there with three companions. L. Robinson asked S. McKibbon if he wished to join the union. L. Robinson used to work on the line with S. McKibbon and had had several conversations about the union during the previous campaign. To her surprise, since S. McKibbon had openly campaigned against the union in the last organizing drive, S. McKibbon agreed to sign a card. The requisite information on the card was filled in; S. McKibbon signed as applicant and L. Robinson as collector. L. Robinson had requested the $1.00 initiation fee. Initially, S. McKibbon provided a handful of change from his pocket but the amount totalled less than $1.00. L. Robinson insisted she need "a buck" and pointed out that there was change on the table occupied by S. McKibbon and his friends. S. McKibbon collected some of that change and, with L. Robinson watching, counted out $1.00 which L. Robinson accepted. The Board found L. Robinson to be a highly credible witness. In contrast, S. McKibbon's story was inconsistent and

implausible. He tried to characterize the transaction as a "joke", and, at one point, suggested L. Robinson had "taken advantage of him" because of his inebriated state. There is no dispute that S. McKibbon had been drinking. However, the Board finds that he knew full well the nature of the transaction. His motive in signing the card (whether he sought to impress his friends, for example) is of no concern to the Board as the Board is satisfied his act in joining the union was voluntary.

16. W. McKay, a national representative for the CAW in the organizing department, had taken over the campaign from T. Heller (a CAW representative who was transferred from organizing to servicing). W. McKay verbally reviewed the instructions given to collectors at his initial contact with each collector and at the frequent organizing committee meetings thereafter. W. McKay inquired about the card and the $1.00 initiation fee each time he received cards and monies from the collectors. Further, he subsequently reiterated those queries before submitting the Form 9 declaration to the Board. At that point, W. McKay worked from a computer sheet listing each employee who signed a card; W. McKay checked off each name as the questions were answered. As stated earlier, W. McKay was personally involved when N. Kiraly joined the union. In passing, the Board notes that four Form 9's were completed by W. McKay as more cards were submitted. Initially, W. McKay was uncertain whether the later Form 9's should reflect the cumulative total or just the additional cards and, so, submitted Form 9's in both formats. It should also be noted that the CAW sends out letters to the new members confirming the union's understanding that a card was signed and $1.00 paid and requesting that the individual contact the union if that information was incorrect. The CAW also forwards an "official receipt" for the $1.00 payment, separate from the $1.00 receipt indicated on the membership card itself.

17. During the organizing drive at the Tillsonburg plant, W. McKay distributed a number of leaflets. The local newspaper contained at least one article about the campaign. Buttons, CAW pins, health and safety pins, lighters, hats, pens, T-shirts and sweatshirts were also distributed to employees. The sweatshirts (costing about $15.00 each) were given only to the thirty-odd members of the organizing committee. The other items appear to have been given out more widely: over 200 T-shirts, 150 hats, 75 lighters, 60 to 100 pens. The various items were emblazoned with the CAW logo and worth amounts ranging from $6.00 for T-shirts to $5.00 for hats to under $2.00 for lighters, pens and pins. The distribution of articles was not conditional on signing a card but, with at least one exception, the items were given out in response to employees' requests. The Board heard that N. Kiraly asked for a lighter after she signed a card and was given one. As well, sometime later, a T-shirt was given to her following her request. In contrast, S. McKibbon also requested a T-shirt sometime after he signed a membership card. He was asked if he would wear the T-shirt in the plant; S. McKibbon demurred and was refused a T-shirt. The cost of these various items is not charged against a specific organizing campaign; rather, organizers distribute the material as they see fit and order additional items from the Toronto offices as needed. Organizers may also exchange such items amongst each other depending on their stock on hand. W. McKay testified that the organizing committee met informally about four or five times each week during the campaign. The meetings were usually at Covey's Restaurant; W. McKay would pick up the tab for breakfast and coffee consumed by the committee. In addition, individual employees occasionally attended those meetings, as did N. Kiraly. N. Kiraly did not recall being offered a "free" breakfast and did not order breakfast. She did have coffee and that bill was added to W. McKay's tab. At least M. Shepard had breakfast on the morning of N. Kiraly's card signing; his breakfast was paid by the CAW.

18. The Board next turns to the submissions of counsel which are set out in a highly abbreviated form. As counsel referred to their respective submissions given earlier in the proceedings (see the Board decision dated April 23, 1990), the Board has incorporated those submissions here to the extent relevant.

19. Counsel for the applicant trade union reviewed the testimony in detail in support of his submission that the $1.00 initiation fee had been paid with respect to both N. Kiraly's and S. McKibbon's cards and, in that regard, asserted that neither N. Kiraly nor S. McKibbon were credible witnesses. It was argued the jurisprudence was well-established that "statutory compliance" rather than the "financial sacrifice" noted in the earlier cases was critical and that any doubts about the payment were to be resolved by accepting the acknowledged payment of the $1.00 on the face of the membership card. Counsel argued that the Board was uninterested in the reasons persons joined a union, technical irregularities or the financial arrangements amongst fellow employees. In the alternative, counsel contended that, if either allegation was upheld, that should be considered an isolated incident and only that card should be rejected as the conduct of the organizer, W. McKay, was entirely proper. With respect to the items distributed by the organizers, counsel submitted similar items were given out during the previous campaign and the respondent could not seek to raise allegations of impropriety after the non-pay hearing commenced and following a waiver of hearing executed by the parties when the certification application first came on before the Board. Counsel stressed that the material (hats, lighters, T-shirts, etc.) constituted "promotional" items rather than a negation of a financial sacrifice by the individual in joining the union. Cases cited in support included: *International Nickel Company of Canada Limited*, [1965] OLRB Rep. Oct. 698; *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735; *Eastern Steelcasting Division of Sivaco Wire and Nail Company*, [1978] OLRB Rep. Aug. 725; *E. B. Eddy Forest Products Ltd.*, [1977] OLRB Rep. Oct. 694; *Leon's Furniture Limited*, [1982] OLRB Rep. Mar. 404; *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Aug. 1375; *Allied Signal Automotive of Canada Inc.*, [1989] OLRB Rep. Sept. 927; *V. Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141; *Webster Air Equipment Company Ltd.* (1958), 58 CLLC 26 18,110.

20. The representative of the employee objectors submitted that there were inconsistencies in the testimony with respect to the signing of the cards, collecting of the $1.00 payment and distribution of T-shirts, pens, leaflets, etc.. It was argued that the employees could not trust the conflicting stories of the union witnesses and queried whether the union would be in the best interests of the employees. The representative asserted that the Board should direct a representation vote to reveal the wishes of the majority of employees.

21. Counsel for the respondent stressed that meaningful collective bargaining could not take place where there was substantial doubt about the employees' support for the union. Counsel reviewed the testimony in detail in support of his position that the non-pay allegations had been substantiated. In his view, credibility was critical in the instant case and N. Kiraly and S. McKibbon were credible witnesses. Further, it was argued, the distribution of the "merchandise" had negated the financial sacrifice (albeit modest) required of employees in joining a union. The asserted limitations on the respondent's ability to investigate non-pay allegations and membership support for the union were emphasized as underscoring the need for the highest standard of union conduct in organizing and for the Board to adjudicate the allegations raised in the February 27, 1990 letter. Counsel characterized those allegations as going to the reliability of membership evidence and, thus, always timely. Counsel also contrasted the monies received as initiation fees (under $300.00) with the value of merchandise distributed (around $3000.00) and the potential union dues in a bargaining unit of roughly 400. Counsel also stressed the items distributed had real value in contrast to buttons and pins; distribution of the latter to promote union support was inoffensive, in counsel's view. On this aspect of his submissions, counsel reviewed American cases in particular and submitted the reasoning therein should be adopted, i.e., that there should be no inducement to sign a membership card and such reward vitiates the process. In summary, counsel contended that the cloud cast over the employee support for the union through the non-pays of N. Kiraly and S. McKibbon and the distribution of merchandise could only be removed through the direction of a representation vote. Cases referred to included: *Olympia Floor & Wall Tile*

Company. [1987] OLRB Rep. May 762; *Dough Delight Ltd.*, [1986] OLRB Rep. May 603; *Daltons (1834) Limited*, [1982] OLRB Rep. Apr. 567; *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424; *Calvano Lumber*, *supra*; *Bennett Paving & Materials Limited*, [1980] OLRB Rep. Nov. 1579; *The De Laval Company Limited (Peterborough)* (1952), 52 CLLC 26 17,031; *RCA Victor Company, Ltd.* (1953), 53 CLLC 26 17,067; *The Kendall Company*, [1975] OLRB Rep. Aug. 611; *Easco Tools Inc.*, 1980 CCH NLRB 26 16,944; *NLRB v. Madisonville Concrete Company*, 552 F. 2d 168 (1977); *Labour Services Inc.*, 1984-85 CCH NLRB 26 17,130; *R.L. White Company Inc.*, 1982-83 CCH NLRB 26 15,010; *Owens-Illinois Inc., Forest Products Group*, 1984-85 CCH NLRB 26 16,655.

22. In reply, counsel for the union stated that the practice of distributing such items was long standing and that no Board decision had held that a complaint relating to the reliability of membership evidence may be filed at any time. Counsel stressed that the certification process would be altered significantly if the Board began inquiring into the reasons persons signed membership cards. Cases cited by respondent's counsel dealing with the concept of financial sacrifice were regarded as unhelpful given the reasoning in *Calvano Lumber*, *supra*, and distinguishable on the facts. It was contended that a union could use "salesmanship" to encourage employees to join and the American model should not be adopted into the Ontario context. For convenience, all cases referred to by union counsel have been noted in paragraph 19 above.

23. The Board has reviewed the cases referred to by counsel. That jurisprudence deals with situations wherein non-pay allegations have been established and the Board must decide whether the documentary evidence may be relied upon at all in disposing of the certification application, and, if so, whether the confirmatory evidence of majority support for the union through a representation vote is necessary to dissipate the "cloud" cast over the membership evidence by the improprieties: see generally, *Webster Air Equipment Company Ltd.*, *supra*; *The Kendall Company*, *supra*; *Crock & Block Restaurant and Tavern*, *supra*; *Calvano Lumber & Trim Co. Ltd.*, *supra*; *Dough Delight Ltd.*, *supra*; *Daltons (1834) Limited*, *supra*. In the instant case, however, the Board has concluded on the evidence before it that the non-pay allegations have not been established and that N. Kiraly and S. McKibbon each paid one dollar on her or his own behalf in connection with a membership card duly completed. The Board is not concerned with the reasons N. Kiraly and S. McKibbon decided to join the union absent intimidation, coercion or improper inducement. That is, whether S. McKibbon joined as a joke or as a "macho" act is irrelevant given the absence of improper conduct by the union and the fact that S. McKibbon applied for membership, paid the $1.00 initiation fee on his own behalf and, as noted earlier, knew full well the nature of this transaction in which he voluntarily participated. The Board does not intend to review further its factual findings set out in detail above. The reasoning in the cases such as *Crock & Block Restaurant and Tavern*, *supra*, is thus inapplicable to the instant case. The Board's factual conclusion is sufficient to dispose of the two non-pay allegations.

24. In passing, the Board also comments that there is nothing objectionable in the union's practice of forwarding a second "official" receipt along with a covering letter requesting that the new member contact the union if the person, in fact, did not sign a card and/or pay a $1.00 initiation fee as the union's records indicated. This practice constitutes another check by the union to ensure the accuracy of the membership evidence and, in that regard, is commendable. That the "official" receipt is not signed by the collector of the $1.00 payment is not relevant as this document is not filed with the Board in support of the certification application and the membership cards which are filed comply with the statutory requirements and are signed by the individual collector. The Board further finds that the Form 9 declarant, W. McKay, carefully carried out his responsibilities in questioning the collectors about the signing of the membership cards and payment of the $1.00 initiation fee. There is nothing offensive, of itself, in the fact that four Form 9's

were filed. The Board accepts W. McKay's explanation that he was unsure as to whether to file a subsequent Form 9 showing the cumulative total of cards or simply to indicate the additional cards filed with the Board and, out of an abundance of caution, did both. The Board regards it as unnecessary to require a repetition of the questions W. McKay asked of the collectors concerning the cards submitted in connection with the first Form 9 merely because a subsequent Form 9 showing a cumulative total was filed.

25. The Board next turns to the broader allegation raised in respondent counsel's letter of February 27, 1990 that all cards should be disregarded as unreliable because the memberships were "bought" or, at least, that a representation vote should be directed because of the union's conduct. In the Board's view, this raises questions of the proper characterization of the allegations, timeliness and the substance of the allegations in the instant case.

26. Respondent counsel referred to several American cases in support of his arguments and submitted that the reasoning contained therein should be adopted. In those cases, representation votes were set aside and new votes directed because of the conduct of the union in paying employees to be election observers, taking care of an employee's traffic ticket, purchasing alcoholic beverages during the election period and distributing jackets. Those actions were found to have vitiated the "free choice" essential to an election (see *Easco Tools*, *supra*; *Madisonville Concrete*, *supra*; *Labor Services Inc.*, *supra*; *Owens-Illinois*, *supra*). In contrast, the anti-union T-shirts given out by an employer to employees was not objectionable as an "unlawful benefit" because of the minimal value of the shirts, although other conduct of the employer encouraging the employees to wear the shirts was improper. T-shirts were found to be "campaign propaganda" akin to buttons, stickers or other items bearing a message or insignia: *R.L. White*, *supra*. With respect, the Board does not find those cases to be of assistance for two reasons. Firstly, the statutory scheme for certification differs significantly between the United States and Ontario. Jurisprudence developed in a different legislative context is not readily transplanted. Secondly, the Board considers that, while the instant case may be regarded as novel in some respects, the reasoning articulated in the Board's jurisprudence does provide considerable guidance in resolving the matter.

27. In the Board's opinion, the allegations are more properly characterized, not as a "non-pay", but as an "inducement" to join the union. In that sense, the prospect of "merchandise" (to use respondent counsel's term) is a "lure" enticing persons to join the union, in contrast to a "threat" made to compel a person to become a union member. On that basis, allegations of "inducing memberships" must be made in a timely fashion and are subject to the usual strictures contained in Section 72 of the Board's Rules of Procedure. In the instant case, the Board need not determine whether the allegations are timely in the circumstances as the Board has concluded that the allegations should be dismissed on their merits in any event.

28. The concept of an "inducement" to join a union is not new to the Board. In the context of "two-tier" initiation fees, the Board's approach is to differentiate between "salesmanship" and "fundamental misrepresentation, coercion and intimidation". As noted in *Leon's Furniture*, *supra*, "the reduced payment before certification has been viewed by the Board as a borderline tactic which has sometimes crossed the line of acceptability". The Board determines each case on the specific facts but considers the remarks themselves, the context in which they were made, the speaker, etc. (see *Leon's Furniture* and the cases cited therein).

29. The distinction between salesmanship and fundamental misrepresentation is echoed in *Vogue Brassiere*, *supra*. In that case, the Board found that the possibility of purchasing the employee's car or finding a job for her boyfriend were not made conditional on the person signing a membership card. The organizer's conduct did not exceed the bounds of acceptable salesman-

ship. The Board concluded that the individual voluntarily signed an application for membership "fully aware of all the material facts and what it was that she was doing". The Board's analytical approach is useful to set out here:

> 7. The issues raised by the employer's charges bring into play two fundamental principles with respect to Board certification. The Board has many times emphasized that it requires the highest standards of integrity from individuals engaged in trade union organizing, particularly in view of the "hearsay" nature of the evidence upon which the Board must rely. On the other hand, the whole basis for the Board's acceptance of hearsay evidence in this regard is to provide objective and confidential evidence of employees' wishes, without the necessity of a full investigation into the thought process of every employee in each case. The Board must continue to supervise the organizing process carefully. However, the Board has, given the nature of that process, been reluctant to impose unrealistic standards on organizers with respect to styles or degrees of "salesmanship". The test which the Board has developed has most recently been set out and considered in the case of *Leon's Furniture*, [1982] OLRB Rep. March 404, where the Board noted, at paragraph 11:
>
> > The Board has drawn the line of regulation between salesmanship and improper conduct at fundamental misrepresentation, coercion and intimidation.
>
> Beyond that line, the Board recognizes that an employee's decision ultimately to sign a card can be the product of a number of factors, and the Board is not prepared to engage, as a general rule, in *ex post facto* analyses of what it was specifically that motivated the employee to sign in each particular case. (Compare *Baltimore Aircoil* [1982] OLRB Rep. October 1387.) In the absence of conduct that crosses the bounds of acceptable salesmanship, in other words, the card which the employee has signed is allowed to speak for itself.

30. The tolerance by the Board for "salesmanship" is reflected as well in the "hands-off" approach which the Board adopts in connection with electioneering and campaigns unless it may be concluded that a "reasonable" voter was misled: see, for example, *McMaster University*, [1979] OLRB Rep. July 685; *Staffer-Dobbie Manufacturing Co. Ltd.*, 59 CLLC 26 18,147; *Robertson Yates Co. Ltd.*, [1978] OLRB Rep. Jan. 30; *Indusmin Ltd.*, [1982] OLRB Rep. Nov. 1641; *Allied Signal Automotive*, *supra*.

31. The Board considers that a similar approach is appropriate in the context of "inducements" (as distinct from intimidation or coercion). The Board must proceed on a case by case basis in the context of the specific circumstances. However, in deciding whether the impugned conduct crosses the boundary of acceptability, the Board must be cognizant of the realities of an organizational drive. A certification campaign depends for its success on the ability of union organizers to persuade employees to become members. Means of persuasion include meetings to discuss the advantages of unionization, the distribution of leaflets and personal contacts by in-plant organizers with their fellow employees. Visible demonstrations of support for the union through the wearing of pins and buttons are commonplace in campaigns and serve as a graphic indication of the level of that support amongst employees. The Board should be chary of circumscribing the use of such propaganda tools.

32. In the instant case, the union widely distributed hats, T-shirts, pens, lighters, pins and buttons emblazoned with the CAW logo. Members of the organizing committee received sweatshirts. The giving out of the items was not conditional on signing a card. The value involved was modest. In the circumstances, it could not legitimately be said that a reasonable employee would have been induced to join the union in order to receive a CAW T-shirt, for example. The close nexus between the items distributed and the campaign is clearly evident in the prominence of the CAW logo on the items and the refusal of S. McKibbon's request for a T-shirt because he would not agree to wear the shirt in the plant.

33. The Board is not here establishing the outer parameters of acceptability. In determining whether the union's conduct crosses the line of acceptable "propaganda" into the outright "buying of memberships" referred to in passing in *Calvano Lumber*, *supra*, the Board would consider such factors as whether the distribution of the articles was conditional upon signing a membership card, whether the value of the goods was excessive and whether the nexus between the items and the union's campaign was close so that their "propaganda value" to the organizing drive was clear. The Board does not characterize the union's conduct in handing out the various articles in the instant case as crossing that boundary. As well, the Board does not regard it as objectionable that the union picked up the tab for coffee and breakfast for the organizing committee and the occasional employee who attended the informal committee meetings to ask questions of the union officials. Again, the Board is not here demarcating the outer limits of propriety where the union provides what might generically be referred to as "hospitality".

34. The level of membership support would entitle the applicant to automatic certification unless the Board exercised its discretion under section 7(2) to direct that a representation vote be taken. For the reasons given, the Board does not view the membership evidence as "under a cloud" so as to require the confirmation of a representation vote.

35. A certificate shall issue to the applicant in respect of the bargaining unit described in paragraph 4.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; June 11, 1990

1. Case law revealing the Board's approach to and disposition of "non-pay" allegations evolved at a time when the *Labour Relations Act* granted unions winning certification the sole and exclusive right to bargain on behalf of the employees in the bargaining unit concerned, and the right to require the employer concerned to negotiate in good faith with a view to concluding a collective agreement.

2. Amendments to the *Act* guarantee the union, in addition to the foregoing, a two-year collective agreement (if necessary through first contract arbitration) as well as dues for that period from every employee in the unit in an amount determined by the union.

3. Armed with these assurances an organizing union can make a simple and reasonably accurate estimate as to the dues income a prospective bargaining unit will return during the guaranteed period, (i.e. no. of employees in the union X annual dues X 2), as well as a calculation of their organizing costs. These two figures will yield what in other business contexts would be referred to as a "cost-benefit analysis" or "return on investment" and in the instant case, with more than 250 potential dues-payers in the proposed bargaining unit, the stakes are high. As in other areas of merchandising it may become increasingly tempting to "sell the sizzle rather than the steak" and indeed, at times when the public images of unions and collective bargaining are in low esteem, the pressure to adopt such an approach may become irresistable.

4. There may be nothing inherently unlawful or morally wrong in what amounts to buying support for a certification application but where, or if, such support can be translated into on-going support for the union in collective bargaining is moot at best. Moreover, the possibility of disaffected employees, and employers seeking to test the degree of support is foreseeable.

5. In rendering decisions the Board should bear in mind the public policy objective of harmonious relations, as stated in the preamble to the *Act*, and the clear inference that essential to that goal is that the trade union be "the freely designated representative of employees".

6. The legislative changes I have identified, and their consequential impact on the organizing approach and process I perceive, argue for a reconsideration of the manner in which the Board shall exercise its discretion in terms of reliance upon membership evidence, (given its hearsay nature), as opposed to a government supervised secret ballot in the effort to determine whether in fact a given union is the freely designated choice of a majority of the employees to be affected.

7. In the instant case we are dealing with the third attempt by this union to win certification. The prior attempts were of sufficiently recent vintage that many of the players remain the same.

8. One need not have had a life-time experience in labour/management relations to have an understanding that an organizing drive frequently, if not routinely, results in people choosing up sides at both a personal and institutional level with traumatic consequences for the individuals and turmoil in the workplace generally. In our case the first organizing effort met with no success at the Board, the second resulted in a certification vote which was lost by the union. The current application may indeed reflect greater success than the earlier two on the part of the union in winning employee support but even in the absence of an intervention by a group of objecting employees as well as the two separate allegations of non-payment, I would not have thought it prudent to rely on hearsay evidence and in the circumstances would have ordered a certification vote.

1041-89-R; 0717-89-G; 1502-89-G International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Applicant v. **Landmark Contracting Ltd.** and Landmark Structures (Ontario) Ltd., Respondents; International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, Applicant v. Landmark Contracting Limited, Respondent; International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, Applicant v. Landmark Contracting Limited and Landmark Structures (Ontario) Ltd., Respondents

Construction Industry - Related Employer - Remedies - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights

BEFORE: *Inge M. Stamp,* Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine.*

APPEARANCES: *Peter I. Waldmann, Tony Almeida* and *Christine O'Neill* for the applicant; *Carl Peterson* and *Doug Lamon* for the respondents.

DECISION OF INGE M. STAMP, VICE-CHAIR, AND BOARD MEMBER D. A. MacDONALD; June 27, 1990

1. These are two referrals of grievances to arbitration pursuant to section 124 of the

Labour Relations Act. Related to the section 124 referrals is an application pursuant to section 1(4) of the Act.

2. At the outset, counsel for the respondents agreed to the pre-conditions required for a section 1(4) declaration. Both companies are under common direction and control. Counsel for the respondents submits that a section 1(4) declaration is not appropriate in the circumstances of this case and that the Board, in the exercise of its discretion, should dismiss the section 1(4) application.

3. Counsel for the respondents further submits that the work referred to in the grievances is not in the ICI sector but in the sewer and watermain sector.

4. Doug Lamon testified on behalf of the respondents and Tony Almeida and Enrique Alves gave evidence on behalf of the applicant.

5. Doug Lamon testified with respect to the history of the two companies. Lamon worked for W. A. MacDougall on one of the largest sewage treatment plants built in Canada. After MacDougall went out of business, Lamon together with two other persons, incorporated Environmental Technical Services Inc. ("E.T.S. Inc.") in February 1972. The three principals were A. McKinlay, President, K. Gordon, Treasurer and D. Lamon, Secretary. E.T.S. Inc. built sewage water treatment plants. In September of 1989 the E.T.S. Inc. charter was surrendered.

6. On March 30, 1976 E.T.S. Towers Inc. ("E.T.S. Towers") was incorporated to build water storage tanks.

7. At the time of incorporating E.T.S. Towers, there was only one other company (Chicago, Bridge & Iron) specializing in the construction of water storage tanks. This company built almost all the water storage tanks in Ontario and Canada. The water storage tank designed and built by E.T.S. Towers is radically different. It consists of an elevated water storage tank made of steel with a concrete sub-structure. At the present time there are three companies using this system, namely Chicago, Bridge & Iron, the respondent and KWI, a company started by a former employee. E.T.S. Towers' crews did all of the work except electrical and the painting of the tank, which was sub-contracted. The steel erection and field welding is also sub-contracted. The E.T.S. Towers' crew consists of four to six men, depending on the size of the tower. The crew work together doing the formwork, cement finishing, tying-in the reinforcing steel and mechanical work.

8. E.T.S. Towers also builds steel stand pipes. The walls are structural steel, concrete base with the water storage part as a steel cylinder sitting on the base or on the ground.

9. The purchasers of elevated water storage tanks are various municipalities throughout the province of Ontario. These are all publicly tendered and advertised in the Daily Commercial News. There are two to three companies who bid on this work, including the respondent.

10. By February of 1977 there were only two partners left. The third partner, Gordon, had been bought out. By the early 1980's E.T.S. Inc. and E.T.S. Towers were experiencing financial difficulties. The decision was made to shut down E.T.S. Inc. and Lamon bought out the remaining partner, McKinlay. Previous to that Lamon had been mainly responsible for the water storage tanks end of the business. In his testimony he stated, "My partner McKinlay had served the same role in general construction. After the buy-out, I cleaned up E.T.S. Inc. and ran Towers". Around the mid 1980's, Lamon "put everything to bed". The general business climate got better and Lamon decided to go back into the general contracting field. In 1985 Lamon Ltd. became Landmark Contracting Ltd. ("Landmark Contracting"), with Lamon and Piendle as co-officers and

shareholders. Piendle handles the field work and is the general superintendent of Landmark Contracting Ltd. Doug Lamon is involved in Landmark Contracting in a financial role, cost control and review.

11. After E.T.S. Inc. was shut down (in September of 1989) Doug Lamon phased out all of the companies which had other partners, out of a concern of possible liabilities incurred by the former partners. Doug Lamon phased out E.T.S. Inc. E.T.S. Towers became Landmark Structures (Ontario) Ltd. ("Landmark Structures") on March 10, 1987. The head office remained the same.

12. Exhibit 8 is a list of water storage tank contracts completed by Landmark Structures for the years 1987, 1988 and 1989. One of the contracts is for the Township of Hornepayne dated August 10, 1987. This contract is identified as Project No. 7-0619, Contract 1, and describes the work as "construction of elevated water storage facilities and booster pumping station". Exhibit 10 is a list of projects completed by Landmark Contracting Limited from 1985 to 1989. This list includes underground reservoirs, sewage treatment plants, pump stations and water treatment plant and granular storage silos. One of the contracts is for the Township of Hornepayne dated October 28, 1988 and is identified as Project No. 7-0619 (the same number as above for Landmark Structures), Contract 3, and describes the work as "construction of water pumping stations".

13. Some of the bid documents show the old name "E.T.S. Towers Inc". This was done in error and "Landmark Structures (Ontario)" was inserted in its place. These projects were highly visible, with the water tank at Virgil reaching 190 feet. Other elevated water storage tanks built by the respondent varied in height from 100-150 feet. Parry Sound and Trenton were visible from the highways nearby. The successful bidder was announced in the trade publication DCN. The raising of the steel sections generally receive some local media attention.

14. In January of 1981 Water & Pollution Control published a colour photograph and an article which read as follows:

New water tanks have pleasing aesthetics and functional design

A new design for elevated storage tanks has been developed by E.T.S. Towers Inc. of Hamilton, Ont. It has now passed the prototype stage and has become a new, acceptable addition to existing designs.

Tanks ranging in size from 250,000 to 750,000 gallons have been built or are under construction by this company in eight locations throughout Ontario. The company's goal in the development of this new design was a product which competes aesthetically with the popular spheroid tanks with the price of the less popular but more economical multi-legged structures.

The E.T.S. structure is composed of three elements: a concrete shaft, a steel tank and a highly engineered connection between the first two elements. Materials are used to their best advantage, concrete in the mainly compressive member or shaft, steel in the mainly tensile and water retaining member or tank. The end product seems to be an ideal combination of engineering integrity, aesthetics and economy.

The economical use of materials is complemented by the inherent stability of the support shaft which offers particular advantage in bad ground conditions and earthquake zones. In addition, the company employs a unique and revolutionary construction system to minimize erection costs. The composite nature of the structure offers long term advantages from the maintenance aspect also, eliminating costly re-paint of the support and supplying an above-ground, totally enclosed valve chamber within the support column.

15. Doug Lamon testified that Landmark Contracting has never bid on or built an elevated storage tank. E.T.S. Towers or Landmark Structures has not bid on or built any storage silos.

16. The unique design and construction method was developed by the respondent, including the design and building of a crane support and modifications to a standard crane. The respondent designed a specialized hydraulic drive for the crane. The forms used for the dome's formwork are built in the respondent's shop using fibreglass. Doug Lamon holds patents for its construction system and design. This system was used in the two projects that are the subject of the grievances.

17. The crew working for Landmark Structures Ltd./E.T.S. Towers Inc. are made up as follows:

Hugh Tuttenham	– Carpenter	– 5 years with the respondent
Ken Sacco	– Carpenter	– 10 years with the respondent
Harold Gottwald	– Hoistman	– 10 years with the respondent
Dave Russell	– Labourer	– 10 years with the respondent
Bob Greenaway	– Labourer	– 10 years with the respondent.

18. Doug Lamon described the difference in terms of constructing a silo compared to an elevated water tank. The silo at 48 feet is considerably lower than the tanks which are between 100-150 feet. Silos require tensile forces not necessary in water tanks, post tensioning, mesh for crack control and reinforcing steel. Openings have to be included for delivery of material and for small machinery at the base, i.e., hoppers and conveyors.

19. On July 22, 1987 Lou Zych signed a voluntary recognition agreement (Exhibit 14) between Landmark Contracting Limited and the International Association of Bridge, Structural and Ornamental Iron Workers, which read as follows:

VOLUNTARY RECOGNITION AND ACKNOWLEDGEMENT

The undersigned Employer hereby voluntarily recognizes the International Association of Bridge, Structural and Ornamental Iron Workers and the Ironworkers District Council of Ontario, Local Unions 700, 721, 736, 759, 765, and 786 in the Province of Ontario as the exclusive bargaining agent for all Rodmen in the employ of the Employer in the Province of Ontario.

The undersigned Employer also acknowledges that by reason of the recognition it is bound by the Collective Agreement between the Rodmen Employer Bargaining Agency, consisting of:
The Industrial Contractors Association of Canada
The Labour Relations Bureau of the Ontario General Contractors Assoc.
The Reinforcing Steel Institutes of Ontario
The International Association of Bridge, Structural and Ornamental Ironworkers District Council, Local Unions 700, 721, 736, 759, 765 and 786 of the Province of Ontario.

Dated this 22nd day of July 1987

Landmark Contracting Limited
Company Name

494 Wentworth St. N., Hamilton, Ont. L8L 5W9
Company Address and Telephone Number

"Lou Zych"
Signature of Company Representative

The Union accepts the recognition herein and acknowledges that the Employer is bound by the aforementioned Collective Agreement.

Dated this 2nd day of July, 1987

International Association of Bridge, Structural and Ornamental Iron Workers

"Illegible" Local Union 700	"L. Baillie" Local Union 759
"Antonio Almeida" Local Union 721	"Illegible" Local Union 765
"Illegible" Local Union 736	"Illegible" Local Union 786

20. Lou Zych has been with the respondents for 13 years and is the second most senior employee. He was on the E.T.S. Tower payroll and is now paid by Landmark Structures. His time is charged out to whatever company he works for. Zych handles most problems, but if he feels that D. Lamon should get involved he gets in touch with him. When Zych signed the voluntary recognition agreement (Exhibit 14) on behalf of Landmark Contracting on July 22, 1987, Landmark Structures had been incorporated since March 1987. Landmark Structures was working on the Trenton job (Exhibit 8), an elevated water tank. At that time, Zych was on E.T.S. Towers' payroll along with other office staff. Their time was then back-charged to the applicable company.

21. The five persons in the crew referred to earlier in paragraph 17 worked at both the Ashbridges Bay and the Barrie water storage tank jobs. They were paid by Landmark Structures and the jobs are Landmark Structures projects (see Exhibit 8). The crew are members of various construction unions. Gottwald belongs to the hoisting engineers (Operating Engineers) Union; Sacco is a member of the Carpenters Union; Greenaway and Russell belong to the Labourers Union. Tuttenham apparently belonged to the Carpenters Union in another province.

22. Because of the general contracting nature of the business, the number of employees of Landmark Contracting fluctuates considerably from 12 permanent employees up to between 30-40 in total depending on the stage the job is at. These employees are paid by Landmark Contracting and shown as employees of Landmark Contracting. According to Doug Lamon, Contracting employees do not work for Landmark Structures.

23. The welding of steel was sub-contracted on the Ashbridges Bay job. At Barrie, the steel was sub-contracted to Landmark Steel Ltd. for the steel erection and welding. Landmark Steel has a province-wide agreement with the Boilermakers. Doug Lamon is a fifty per cent owner in that entity. The work done by Landmark Steel does not involve any rod or wire mesh work.

24. At the time the voluntary recognition agreement was signed, there were ironworkers working at the Aurora storage silos. Doug Lamon agreed that at the relevant time there were members of the bargaining unit working under the collective agreement for Landmark Contracting.

25. At the pump station in Holtyre (Exhibit 10) Landmark Contracting sub-contracted the rod work to a union firm. The same was done in Mono Mills and Richmond Hill. The Board has not been provided with the names of these sub-contractors. The only projects Landmark Structures (Ontario) Ltd. worked on in Local 721's jurisdiction were those of Ashbridges Bay and Barrie, which are the subject of the two section 124's. The work was performed by a composite crew crossing jurisdictional lines, except for the hoisting engineer.

26. Both the Aurora Silo and the water storage tanks use a "jump form system". The Aurora Silo also included some "hand set" areas.

27. Lamon testified that neither Landmark Structures nor E.T.S. Towers has ever been bound to the Labourers or Carpenters agreement.

28. Landmark Structures is bound to the hoisting agreement with the Operating Engineers. Landmark Contracting is bound to the Carpenters and Labourers agreement.

29. Antonio Almeida, the Business Agent of Local 721, testified that Landmark Contracting telephoned the union hall for a job in Aurora requiring rodmen to place rebar. The union sent two men. They quit and Landmark Contracting requested replacements and the union sent Henry (Enrique) Alves. In response to Alves' question of whether Landmark Contracting was bound to a collective agreement, Almeida checked the applicant's records. When Almeida discovered that Landmark Contracting was not bound by their agreement, he called L. Zych and explained that in order for the union to dispatch members to Landmark the company would have to sign a voluntary recognition agreement. Zych indicated that this was no problem and that he was quite happy with the work performed by Alves. Zych's secretary typed in the name and date and Zych signed five copies, one for each local of the applicant in the province of Ontario.

30. The subject of Landmark Structures did not come up and Almeida did not recall seeing any signs of any other company name. The only thing discussed was the job in Aurora. While driving along the Gardiner Expressway, Almeida came across a project using reinforcing concrete. On investigating the site, he found a trailer with the name Landmark Structures on it. Almeida obtained a telephone number from one of the persons on the site but did not speak to anyone else as they were working 75 feet up. The telephone number and the address were the same for Landmark Structures and Landmark Contracting. Almeida then filed a grievance. Through discussions at the Ashbridges Bay site with members of other trades, Almeida discovered the Barrie project and filed a second grievance.

31. At the Barrie site there was a handwritten notice with the name of the company on it. Almeida went to the top of the tower and talked to the employees. They told him they belonged to a number of different unions. Almeida described the work functions which he observed at Barrie and Aurora. Almeida stated that the work performed on silos, smoke stacks or water towers is all the same; it is all done by composite crews under the same system. There may be different designs but when it comes to "jumping forms" and pouring concrete, it is all the same work. According to Almeida, composite crews are permissible under the international agreements, "it is all reinforcing concrete". The Aurora job had a large percentage of reinforcing bars and welded wire mesh.

Argument

32. The respondents' argument covers two main areas:

1) Whether or not there has been an erosion of bargaining rights or scheme requiring the Board to exercise its extraordinary remedial powers under section 1(4).

2) Whether the applicant delayed and "sat" on his rights.

The respondents admitted they met all the pre-conditions for a section 1(4) declaration under common direction and control, associated or related activities or businesses. All the decisions deal with whether or not the Board should exercise its discretion. Counsel for the respondents cited paragraphs 16 and 17 of *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. 308, which read as follows:

16. The criteria used by the Board in determining whether to exercise that discretion were set out in *John Hayman and Sons Co. Ltd.*, [1984] OLRB Rep. June 822 at 827-28:

> "(1) whether the applicant is seeking to acquire bargaining rights by means of section 1(4) in order to avoid the certification procedures of the Act;
>
> (2) whether a declaration would disturb existing bargaining rights;
>
> (3) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented;
>
> (4) whether the application has been made within a reasonable time after the applicant became, or with reasonable diligence, should have become aware that the two or more entities were closely related; and
>
> (5) whether a scheme exists which would effectively defeat bargaining rights by transferring work from one related entity to another."

17. In *Donald A. Foley Ltd.*, [1980] OLRB Rep. April 436, the Board stated:

> "One of the significant purposes of section 1(4) is to guard against the dilution or undermining of bargaining rights already obtained such, for example, as occurs when work is diverted from a unionized employer to an associated, newly created non-union one as in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; or when there is a risk or threat that bargaining rights may be eroded, as in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879. For a more detailed review of the purpose of section 1(4), however, see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Oct. 1029 at paragraphs 9 to 13 inclusive."

33. The respondents cited paragraph 12 of *Capricorn*, *supra*, with respect to the applicant's onus to adduce evidence and to bring forward a rationale in terms of labour relations policy and consistent with the Board's jurisprudence in order to convince the Board to exercise its discretion in these circumstances.

34. Counsel submits that it is important to look at this case in light of the purpose of section 1(4). The commercial and legal realities are consistent. In July 1987 when the applicant and the ABA entered into the voluntary recognition agreement they inherited a well-established commercial structure which had been in place since 1976. As of 1976 there was a well-established system whereby E.T.S. Inc. performed general contracting work, performing items such as sewer and watermain plants, pump stations, jobs like the ones set out in Exhibit 10 now performed by Landmark Contracting. At no time did Landmark Contracting or E.T.S. Inc. construct an elevated water storage tank.

35. The commercial activity which the union found in 1987 included E.T.S. Towers, which since 1976 has built 11 water storage tanks under the name of E.T.S. Towers and from March 1987 to the present time under the name Landmark Structures (Ontario) Ltd. The change in March 1987 was a name change only. The commercial activity continued without any change. Landmark Contracting had been around since the 1970's and Landmark Towers had been around for over 11 years. That was the commercial reality in place when Landmark signed the voluntary recognition agreement. There has been no alteration in the legal form since July 1987. There has been no transfer of work from one legal entity to another. There has been no spin-off of a non-union company after the union acquired bargaining rights performing certain kinds of jobs. There are two well-defined commercial activities. The trade union's bargaining rights attach to a well-defined commercial activity. They do not attach to the other well-defined commercial activity, that being E.T.S. Towers Inc./Landmark Structures performing work on water tanks. This is a specialized

industry and has only a couple of companies building these types of structures. These are unique structures and are clearly recognizable as water towers. This case involves a very narrow scope of work. The legal and commercial form remained static over a long period of time without any evidence that they would change or any reason for them to change.

36. Counsel submits that for the following reasons this is exactly the situation where the Board should exercise its discretion:

1) The applicant is attempting to acquire through the back door what it has not acquired through the front door.

2) Landmark Structures is not bound to any other union with respect to ironworkers' work.

3) What is at issue here is the rights of the employees of Landmark Structures and previous to that E.T.S. Towers Inc. for ten to thirteen years. (See para. 16 of *Joe Franze Concrete Ltd.*, [1983] OLRB Rep. Dec. 631.) Landmark Structures does not have a collective agreement with any trade union except the hoisting engineer.

4) The applicant should have brought this application before doing so in 1989.

5) There is no scheme to defeat bargaining rights by transferring work from one related entity to another. In fact, the way the union came on the scene crystallizes a corporate set-up that as long as it remains the same there is no scheme. This is not a case where the respondents have set up a new entity to siphon off work or set up a sub-contract or front man. There is no situation here where Landmark Contracting is transferring work to Landmark Structures. Landmark Contracting or E.T.S. Inc. has never performed and has no intention of performing elevated water storage tanks.

6) There is of course nothing to prevent the applicant from bringing an application if Landmark Structures was to stray away from only doing elevated water storage tanks. It would be easy to detect.

37. Counsel submits that section 1(4) is not meant to be a substitute for an application for certification. The evidence is clear. What is important is whether there was an established company in place when the union acquired bargaining rights as in *John Hayman & Sons*, *supra*; *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844 or *Gerald Davidson Plumbing & Heating Limited*, [1984] OLRB Rep. 462. This case is in the mainstream of the Board's jurisprudence, not in the grey areas. It is a much stronger case than *Capricorn*, *supra*, where the Board dismissed the application. Counsel referred the Board to paragraph 15 of the decision in *Bramalea Carpentry*, *supra*, which states:

> 15. In a number of cases the Board has observed that section 1(4) is designed to *preserve* rather than *extend* bargaining rights. It is not to be used as a substitute for certification. (See: *Farquhar Construction Ltd.* [1978] OLRB Rep. Oct. 914 and cases cited therein; *H. Allaire & Sons Co. Ltd.* [1974] OLRB Rep. July 457; *Inducon Construction* [1975] OLRB Rep. Apr. 399; and, most recently *W.M.I. Waste Management* [1981] OLRB Rep. March 409.) In our view, that is precisely what the union is trying to do in this case, where there was an established business and employee complement predating the bargaining relationship, and no evidence of a concrete ero-

> sion of the union's bargaining rights. Accordingly, the Board is not prepared to exercise its discretion to issue a section 1(4) declaration. If the union wishes to acquire bargaining rights for the Pinehurst employees, it will be necessary to enrol them into membership, and apply for certification.

In support of its position the respondents cited a number of cases including *Mandic Bros. Drywall and Const. Ltd.*, [1982] OLRB Rep. May 693; *Joe Franze Concrete Ltd.*, *supra*; *Gerald Davidson Plumbing & Heating Limited*, *supra*; *John Hayman & Sons*, *supra*; *Miracle Feeds*, [1985] OLRB Rep. Sept. 1390; *Steve's Sheet Metal Company*, [1985] OLRB Rep. Dec. 1804; *Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935.

38. Counsel submits that there is no evidence of erosion of the applicant's bargaining rights. The status quo has been followed since 1976 before the Ironworkers were involved and has been religiously followed up to this point in time.

39. The second part of the respondents' submissions deal with delay. Counsel cited paragraph 12 of *W.M.I. Waste Management of Canada Inc.*, *supra*, which states:

> 12. In our view that argument cannot succeed. A party requesting the Board to exercise its discretion to provide the extraordinary benefit of a declaration under section 1(4) has, at the very least, an onus to call affirmative evidence to explain an obvious failure to assert its rights for a substantial number of years. It is well settled that delay by a union may preclude it from pleading the benefit of section 1(4) of the Act. (*Ellwall & Sons Construction Ltd.*, [1978] OLRB Rep. June 535). Moreover, in any case, the Board should not permit section 1(4) applications to disturb established bargaining structures (*Crown Cork & Seal*, [1978] OLRB Rep. Sept. 809).

Since the signing of the voluntary recognition agreement in July 1987 a number of water towers have been built by Landmark Structures until July 1989 when this complaint was filed. In two years, ten of these structures have been built. They are hard to miss. There are public tenders reported in the trade publication, Daily Commercial News. There is no evidence as to why the application was not brought sooner.

40. There is absolutely no evidence in light of the decision in *W.M.I. Waste Management*, *supra*, as to why there are two years between the voluntary recognition agreement and the filing of this application. The respondents cited a number of cases where the Board declined to exercise its discretion to make the section 1(4) declaration where there were delays from eight months to three years. Counsel submits that the test is whether the applicant knew or ought to have known. Paragraph 16 of *Capricorn*, *supra*, states:

> 16. The criteria used by the Board in determining whether to exercise that discretion were set out in *John Hayman and Sons Co. Ltd.*, [1984] OLRB Rep. June 822 at 827-28:
>
> . . .
>
> (4) whether the application has been made within a reasonable time after the applicant became, or with reasonable diligence, should have become aware that the two or more entities were closely related; ...
>
> . . .

Counsel submits that towers built by Landmark Structures are high profile buildings and Landmark used the same name in its sister company.

41. Because of the mandatory province-wide scheme the applicant cannot say that because the towers were not in the jurisdiction of Local 721 it did not know about them. The provincial scheme under section 144 contemplates that Local 721 applies on behalf of all affiliated bargaining

agencies and will include all employees bound by a provincial agreement. The respondents request the Board to dismiss the application on the basis of delay as well as lack of mischief.

42. Counsel for the applicant submits that the situation with respect to delay and due diligence is very different in the obligation it puts on a local union. The two projects put up by Landmark Structures in Local 721's jurisdiction are both subjects of the section 124 referral of grievance. Local 721 should not be prejudiced by the action of other locals. Paragraph 23 of *The Great Atlantic & Pacific Company of Canada Limited*, [1981] OLRB Rep. March 285 sets out the test as follows:

> 23. ... There may be no legal requirement for a company to advise a trade union about a related company which might affect the union's bargaining rights, and there may be no requirement that a company which intends to rely upon "the corporate veil" as a defence to a grievance should disclose that defence, however, it is inconsistent, in our view, for a company to take the position that the union "ought to have known" of these matters, when in response to the grievance, the Company itself did not clearly notify the union of the facts. Indeed, the presence in the Act of section 1(5) [creating an onus upon the respondents to reveal the corporate connection between them] suggests a legislative recognition that an applicant trade union generally will not be aware of the business or corporate relationships between the allegedly related businesses. In view of this explicit legislative direction, we do not think that we should adopt an unduly high standard of "due diligence", or readily apply such concept to bar a union which had no *actual* knowledge of the basis on which a section 1(4) application might be made. It will be noted that section 1(4) itself does not expressly contemplate any such bar.

Counsel for the applicant submits that the Board recognizes that unions have limited resources. Almeida was the one that signed this agreement and went out to Hamilton to negotiate with Zych. The Board should note that Zych did not testify. When Almeida went to sign the voluntary recognition agreement he was not aware of any other company; the sign on the door only indicated "Landmark". There was no discussion about any other company or the fact that Landmark Contracting was not the entire entity. There is nothing in the facts here which would suggest anything other than that the applicant Local 721 has found out and complained about every project in its area.

43. It is the applicant's position that with respect to the exercise of the Board's discretion, this case falls into the grey area to the extent that one case can indicate labour relations in the construction industry. The Board must consider the obligation of an employer if it is a multi-entity and wants to avoid a section 1(4) declaration, if there is a factual obligation on them to do what was done in *Gerald Davidson*, *supra*. If one is aware a double-breasted situation exists one must make it clear.

44. Counsel for the applicant submits that there are significant facts which the Board should consider. Initially, the elevated water structures had a limited liability so that if there was any litigation or claims because of design problems, claims would not end up hitting the other assets of the entity. That is the only reason for the two companies - to protect limited liability and to protect the design. The fact that the purpose of these two companies is only for limited liability is not relevant to the labour relations integrity of the entity. It does not matter that the sole rationale bears no impact and is irrelevant for labour relations purposes.

45. Lamon's evidence about the creation of the Landmark corporate vehicles was that he needed to have a clean break with those old companies because they had some debt problems. The employer has control of whatever corporate vehicle it sets up and which in this case is unrelated to labour relations. The applicant is not suggesting that there is an anti-union animus in how they arrange their corporate structure. Where they do make a deliberate clean break the applicant contends they cannot say at the same time that "even though we have made a clean break we are rely-

ing on the history of a long-time business practice of separate companies". At the time of signing the voluntary recognition agreement, Landmark Structures was only in existence for a few months.

46. The exhibits filed by the respondents only reflect those documents the respondent chose to bring. Exhibits 8 to 10 are the only contracts involving those two companies. Exhibit 10 goes back to 1985 and Exhibit 8 only goes back to 1987. There is another exhibit in which the respondent describes every contract back to the founding of E.T.S. Towers as being a contract of Landmark Structures, but that requires one to accept that it was a straight continuation of the business when Lamon's evidence is that it was a clean break. Another company, Landmark Ltd., was incorporated on January 14, 1976 about six to eight weeks before E.T.S. Towers Inc. The respondents' position is that it is a predecessor to the Landmark Structures. Counsel submits that section 1(4) does not allow a company to take advantage of what it can create itself but works the other way around. A union finds what the company has done.

47. The two companies may well be different in terms of some narrow aspects. It does not matter that one only builds water storage tanks and the other builds pumping stations, inground reserves etc. Section 1(4) focuses on the labour relations integrity, not the design distinction. For the purpose of labour relations, there is no difference. In addition, counsel submits that there is evidence that Landmark Structures is building something other than elevated water towers. We have the contracts the respondent chose to produce. Two of the contracts from Hornepayne dated August 10, 1987 and October 28, 1988 relate to the same project. If Landmark Structures has done anything other than elevated water towers the respondent's case "goes down the tubes".

48. Both of these companies do the same work, construction of storage tanks and pumping stations. The only difference is the design factor. They have the same market. They deal with the same customers. Silos are built the same way as elevated towers. There was a cross-over of pay cheques as Zych was on the payroll of Landmark Structures. The employees were paid by Landmark Structures, and the factor which above all distinguishes this case from all the other cases is that this is a case where the work forces are intermingled.

49. The critical part is Lamon's evidence regarding those five employees he could remember who had 5-10 years' service with the respondent between them. All of these people were paid by Landmark Structures and employed by Landmark Contracting. All of them worked on the Aurora site which led to the voluntary recognition agreement. Landmark Structures has a collective agreement with the hoisting engineers. Landmark Contracting has agreements with Rodmen and Labourers and are presumably paying according to the agreements. One day the five employees worked for Landmark Structures and another day for Landmark Contracting. The actual way of working was with a composite crew. All of those people were doing ironworkers' work for both companies as part of a composite crew. When the cheques came from Landmark Structures the employees viewed Landmark Structures as being the true employer. Counsel submits that in *Capricorn*, *supra*, and *John Hayman & Sons*, *supra*, the Board has gone too far because of the fundamental principle of sections 1(4) and 63 which distinguishes them from section 89 requiring an anti-union animus. Paragraph 12 of *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 deals with this head on:

> 12. ... Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargain-

> ing rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now 63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 [now 63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

50. The five factors set out in *John Hayman & Sons*, *supra*, and referred to in *Capricorn*, *supra*, are not carved in stone and the Board should not take a mathematical approach when the fundamental right is to protect the integrity of labour relations. It is not the union's obligation to establish all five criteria. The absence of the last factor, "(5) Whether a scheme exists which would effectively defeat bargaining rights by transferring work from one related entity to another", does not militate against the discretion. If the absence of anti-union animus is a factor for not exercising the discretion then the Board would come into conflict with its decision in *Brant*, *supra*, that section 1(4) does not require anti-union animus. It is a question of whether there is a serious risk that the bargaining rights will be or could be defeated.

51. With respect to onus, the employer has the onus of evidence under section 1(5) although the applicant retains the onus of persuasion. It becomes critical when there are no facts before the Board to allow it to exercise its discretion. The implication is that subject to countervailing considerations, they should be treated as a single employer because it makes sense for labour relations' purposes to treat them as a single employer. If there are no countervailing factors, the onus to prove a negative can be very slight. The obverse of the following statement in paragraph 21 of *J. H. Normick Inc.*, [1979] OLRB Rep. 1177: "If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly" is clearly equally true.

52. Counsel for the applicant submits that all the other cases cited by the respondent refer to various factors. But the Board must return to first principles. The point of the *Labour Relations Act* is for labour relations' integrity. In *John Hayman & Sons*, *supra*; *Capricorn*, *supra*; and *Gerald Davidson*, *supra*, a non-union entity was set up to take advantage of non-union work. Paragraph 20 of *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720 is applicable to the facts in this case. The cases say one should look at the fundamental labour relations' purpose.

53. In summary, the applicant submits that there was no delay. The union caught the respondent in each project in its area. The company's sign only stated "Landmark". There is no evidence that the union was apprised that the entity it was dealing with was double-breasted. Landmark Structures had only been incorporated a few months earlier. There is a factual obligation on the company to make it clear that there is more than one entity as in *Gerald Davidson*, *supra*. It is impossible for the union to know unless it is told. The company can say "we will sign" but it will not apply to the other entity. The only factor for the two companies was to have limited liability in case one of the towers fell over. This is not relevant to countervailing considerations. The other piece of evidence particularly indicative is that we do not have all the contracts but only the ones the respondent brought. There is no countervailing reason why the entity should have Landmark Structures carved out. There is no reason why the existing bargaining rights should not apply to the entire entity. This would create a much more sensible situation, so that when the Carpenters and Labourers go back and forth between those companies they also take their rodmen with them. The distinction in design and the liability issue is not relevant.

Decision

54. The applicant is concerned with the protection of its bargaining rights obtained by the

voluntary recognition agreement signed by Landmark Contracting. There is no evidence before the Board that there has been any erosion of bargaining rights from the date of signing the voluntary recognition agreement in March of 1987 to the section 1(4) application date in July of 1989. Exhibit 8 shows that one contract with Landmark Structures for elevated water storage facilities includes a "booster and pumping station" in August of 1987. Exhibit 10 for the same project shows a contract with Landmark Contracting for "construction of water pumping stations" in October of 1988.

55. Section 1(4) is not intended to expand a union's bargaining rights but rather to protect those rights from erosion. There is no evidence that the applicant's members were transferred from Landmark Contracting to Landmark Structures. The evidence with respect to "employee intermingling" refers to Mr. Zych, who is clearly management, and persons who would not be in the applicant's bargaining unit. In any event, such intermingling appears to be primarily from the un-organized entity to Landmark Contracting which is bound by a number of construction agreements, including the applicant's. The evidence does not support a finding that the respondents are engaged in a scheme to shift construction work from Landmark Contracting to Landmark Structures. In fact there is no suggestion by anyone that the existence of parallel operations was for anything other than for *bona fide* business reasons. These entities existed some years before the union entered into the picture.

56. Accordingly, in all the circumstances of this case, the Board declines to declare that Landmark Contracting Ltd. and Landmark Structures (Ontario) Ltd. be treated as one employer for the purposes of the *Labour Relations Act*. However, should the respondent companies change the operation of their businesses in such a way as to erode the applicant's bargaining rights with respect to Landmark Contracting, the applicant could bring a fresh section 1(4) application as soon as it became aware of the changed circumstances.

57. Having regard to the above, the section 124 referrals of grievances in Board File Nos. 1502-89-G and 0717-89-G are hereby dismissed.

DECISION OF C. A. BALLENTINE; June 27, 1990

1. I respectfully dissent from the majority decision.

2. Based on the evidence and the submissions of the applicant, in the circumstances of this case I would have made the declaration that the respondents are one employer for the purposes of the *Labour Relations Act*, and bound to the applicant's collective agreement.

0068-88-R; 0767-88-R; 1149-88-R; 1484-88-R; 1552-88-R; 2261-88-R; 2666-88-R Canadian Guards Association, Applicant v. **Pinkerton's of Canada Ltd.,** Respondent v. Richard Bibeault, Intervener #1 v. Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3; Canadian Guards Association, Applicant v. Pinkerton's of Canada Ltd., Respondent v. Inco Limited, Intervener #1 v. Attorney-General of Ontario, Intervener #2; Canadian Guards Association, Applicant v. National Protective Services Company Limited, Respondent v. George Faulkenburg, Intervener #1 v. Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3; Canadian Guards Association, Applicant v. Board of Management for the Metropolitan Toronto Zoo, Respondent v. International Union United Plant Guards Local 1962, Intervener #1 v. Ron Saxton, Intervener #2 v. Inco Limited, Intervener #3 v. Attorney-General of Ontario, Intervener #4; Canadian Guards Association, Applicant v. Burns International Security Services Limited, Respondent v. Gordon A. Southorn, Intervener #1 v. Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3; Canadian Guards Association, Applicant v. Wackenhut of Canada Limited, Respondent v. Shane Freeman, Intervener #1, v. Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3; United Steelworkers of America, Applicant v. Pinkerton's of Canada Ltd., Respondent v. Larry Bishop, Intervener #1 v. Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3;

Certification - Charter of Rights and Freedoms - Constitutional Law - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter -Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

BEFORE: *Robert D. Howe,* Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock.*

APPEARANCES: *Brian Shell* and *Paula Turtle* for the applicants and the intervening employees; *M. J. Gleason* for Pinkerton's of Canada Ltd.; *G. S. Monteith, K. Thompson,* and *Robert Avinoam* for the Board of Management for the Metropolitan Toronto Zoo; *Richard P. Stephenson* for International Union United Plant Guards Local 1962; *Michael Gordon* for Burns International Security Services Limited; *Brian P. Smeenk, Maureen F. Fitzgerald,* and *Brett Christen* for Wackenhut of Canada Limited; *Harvey A. Beresford, John C. Field, Wallace T. Gretton,* and *Guy Giorno* for Inco Limited; *Robert E. Charney* for the Attorney-General of Ontario; no one appeared for National Protective Services Company Limited.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN; June 25, 1990

I

Introduction

1. These are seven applications for certification which are being heard together for purposes of determining whether a portion of section 12 of the *Labour Relations Act* (the "Act") is inconsistent with the "freedom of association" guaranteed by section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and if so, whether it is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, within the meaning of section 1 of the Charter. This decision pertains to a non-suit motion that was argued after the applicants and the individual interveners had concluded calling evidence on section 2(d).

2. Section 12 of the Act provides:

> The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

3. It is the position of the applicants and the intervening employees (also referred to in this decision as the "individual interveners") that the portion of section 12 which provides that "no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards", is violative of section 2(d) of the Charter. They also contend that it is not "saved" by section 1. The portion of section 12 which precludes the Board from including in a bargaining unit with other employees a person employed as a guard to protect the property of an employer is not being challenged.

4. In a decision dated June 27, 1988 in File No. 0068-88-R (*Pinkerton's of Canada Ltd.*, [1988] OLRB Rep. June 613), the Board found the Canadian Guards Association (the "CGA") to be "affiliated, directly or indirectly" with the United Steelworkers of America (the "USWA") in view of their relationship under the terms of their Service Contract. Thus, the Board concluded that unless the Charter challenge succeeded, section 12 would preclude the Board from certifying the CGA and requiring Pinkerton's of Canada Ltd. ("Pinkerton's") to bargain with the CGA on behalf of any of its guards.

5. A pre-hearing conference in respect of these applications was convened before Vice-Chair S. A. Tacon on February 10, 1989, and continued on March 10, May 19, and July 7, 1989. On March 10 and July 7, representatives of the parties also appeared before this panel of the Board to make submissions on procedural issues which they had been unable to resolve. Our rulings concerning those issues are set forth in *Pinkerton's of Canada Ltd.*, [1989] OLRB Rep. July 783. (An application for judicial review of that decision was dismissed on August 23, 1989: see [1989] OLRB Rep. Aug. 925.)

6. The Charter hearing was scheduled to begin on September 5, 1989. At the commencement of the hearing, counsel for the respondent Burns International Security Services Limited

("Burns") advised the Board that he had been instructed by his client to object to Board Member Peacock sitting on the panel of the Board assigned to hear this case, on the grounds that his presence on the panel gave rise to a reasonable apprehension of bias. Burns' position was also supported by counsel for Pinkerton's. After recessing to consider the matter, we ruled that the panel would continue as then constituted as we were unanimously of the view that Mr. Peacock's presence did not give rise to a reasonable apprehension or likelihood of bias. We also indicated that our reasons for that decision would issue at a later date. (Those reasons were included in a decision dated January 31, 1990, which has been reported as *Pinkerton's of Canada Ltd.*, [1990] OLRB Rep. Jan. 68.)

7. After rendering that oral ruling, the Board heard submissions concerning disclosure and a further request for an adjournment. (Mr. Charney, who appeared on behalf of the Attorney-General of Ontario on September 5, 1989, took no position on any of the preliminary issues and advised the Board that the extent, if any, to which the Attorney-General of Ontario would be intervening in these proceedings had not yet been determined. Neither Mr. Charney nor anyone else appeared thereafter on behalf of the Attorney-General of Ontario.) After recessing to consider those submissions, the Board made a four-part direction regarding disclosure and production, cancelled all of the hearing dates scheduled in the matter up to and including October 25, 1989, ruled that the matter would continue on October 30 and on the other (22) days previously scheduled, and further ruled that if the case was not completed within that time, it would continue on January 23, 24, 25, 30, 31, February 1, 6, 7, 8, 19, 21, 22, 27, 28, March 1, 12, 13, 15, and on Tuesday, Wednesday, and Thursday of each week thereafter until completed. (Some of those dates were subsequently revised by the Board on the agreement of the parties.)

8. The hearing resumed on October 30, 1989, and continued on October 31, November 1, 6, 7, 8, 20, 21, 22, 27, 28, 29, December 5, 6, 7, 18, 19, 20, 1989, and on January 8, 23, 24, 25, 30, March 29, 30, April 3, 10, 11, 17, 18, 1990. During the evidentiary portion of the hearing which preceded the non-suit motion described in Part III of this decision, the Board heard testimony from Ron Saxton, the individual intervenor in File No. 1484-88-R, who is employed as a security guard by the Board of Management for the Metropolitan Toronto Zoo (the "Zoo"); Stuart Deans, the President of the CGA, who is on leave of absence from his position as a security guard at Carleton University; Gilles Audette, the USWA's Area Co-ordinator for the Montreal area; Harry Hynd, who is the Assistant to the Director of USWA's District 6 (Ontario) and is also a Vice-President of the Ontario Federation of Labour (the "OFL"); and Gordon Lawley. After Mr. Shell had identified Mr. Lawley as an employee of Major Security Inc. at the mining site of Cassiar Asbestos in Cassiar, British Columbia, and had asked him a few introductory questions about his place of residence, no further testimony was heard from him because the parties participating in the hearing agreed upon a seven-part statement of facts which eliminated the need for testimony from Mr. Lawley and the other witnesses whom Mr. Shell had intended to call in respect of those factual matters. That statement was filed with the Board (in two instalments) after it made the following oral ruling on January 30, 1990, in respect of the admissibility of the evidence that Mr. Shell proposed to adduce through Mr. Lawley's testimony (which ruling is equally applicable to the matters covered by all seven parts of the statement):

> The majority of the panel, with Board Member Wightman dissenting, are of the view that although this evidence may be more germane to section 1, it is also of arguable relevance to section 2(d). Accordingly, we are prepared to admit it, subject to final argument regarding its relevance and the weight, if any, to be given to it. Board Member Wightman dissents from this ruling on the basis that, in his view, this evidence falls on the section 1 side of the line between section 2(d) and section 1.

9. In addition to the aforementioned oral evidence, the Board has before it 112 exhibits which were entered during the course of these proceedings. In making the findings of fact set forth in this decision, the Board has duly considered all of that oral and documentary evidence (with the exception of Exhibit 13, which was entered subject to identification but was not subsequently identified), as well as the aforementioned agreed statement of facts.

10. The Board also heard testimony from Professor Bob Hepple concerning his qualifications as an expert witness. However, for the reasons set forth in Part III of our decision dated January 31, 1990 (*Pinkerton's of Canada Limited*, [1990] OLRB Rep. Jan. 68), the majority of the panel, with Board Member Peacock dissenting, found the expert evidence which Mr. Shell sought to adduce through Professor Hepple to be inadmissible in this phase of the case.

Part II

The Facts

11. A number of the facts set forth below ultimately proved to be of little assistance in deciding the non-suit motion. However, they have been included in this decision in order to provide a detailed account of the context in which the Charter issue has arisen. After first describing the three trade unions involved in these proceedings, we will summarize the evidence of Mr. Deans and describe the events which gave rise to the Service Contract and its subsequent termination. We will then summarize Mr. Saxton's evidence with respect to his employment as a security guard, his involvement with the United Plant Guard Workers of America (the "UPGWA") and the CGA, and his reasons for wishing to have the latter displace the former as his bargaining agent.

12. The CGA is a union that admits only security guards into membership. Its objectives are described as follows in Article 2 of its Constitution:

> ARTICLE 2
>
> OBJECTIVES
>
> Section 1 -The organization of security guards generally and in particular all guards in the private and public sector of the economic structure of Canada, not prohibited by Federal or Provincial legislation from participating in the collective bargaining process.
>
> Section 2 -To improve the working conditions of Guards and to promote the common interest of the members of the Association.
>
> Section 3 -To represent the Guards in all matters relevant to conditions of work.
>
> Section 4 -To enter into any agreements or do such other things, which could improve the rights and privileges of its members.

13. Prior to entering into the Service Contract described below, the CGA was not affiliated with any other union. It has never been affiliated with the Canadian Labour Congress (the "CLC"), the OFL, or any municipal labour council.

14. The evidence before us indicates that during the period from March of 1957 to April of 1988, the Board issued over twenty certificates to the CGA in respect of security guards employed by various employers. In 1987 the CGA had about 300 members, approximately 85 of whom were in the CGA's Sudbury local (Local 105), which represents security guards employed by the intervener Inco Limited ("Inco") and is the CGA's largest local.

15. Watson E. Cook described the history and composition of the UPGWA as follows in an

affidavit sworn on August 21, 1989 for use in the aforementioned application for judicial review of our decision dated July 25, 1989, and admitted as an exhibit in these proceedings on the agreement of the parties:

> I, WATSON E. COOK, of the City of Oakville in the County of Halton, MAKE OATH AND SAY:
>
> 1. I am the International Regional Director of Region XII (Canada) of the International Union, United Plant Guard Workers of America ("UPGWA") and as such have knowledge of the matters hereinafter deposed.
>
> 2. The UPGWA was established in 1948 in Detroit, Michigan, for the purpose of organizing collectively and representing the employees employed as plant guards, security officers, security police officers, fire protection and other employees performing protection and security activities for private and governmental employers.
>
> 3. The UPGWA's first Canadian Local was established in Windsor in 1958. Expansion has ensued with employees being organized at a variety of different work locations and employers. Additional locals were established in 1962, 1971, 1980 and 1988.
>
> 4. The UPGWA currently represents approximately 25,000 security guards in the United States. Attached hereto and marked as Exhibit "A" are excerpts from the 1988 *Directory of Labour Organizations in Canada* published by the Bureau of Labour Information of Labour Canada. These statistics indicate that as of January 1, 1988, the UPGWA had a membership of 1425 guards organized in four locals in Ontario and Quebec. Since January 1, 1988 the UPGWA has established a fifth local and has continued to actively organize security guards in the Province of Ontario and Quebec. The UPGWA currently represents security guards employed by approximately 30 different employers in the Provinces of Ontario and Quebec.
>
> 5. Since its inception in the Province of Ontario the operations of the UPGWA have been governed by provisions of the Ontario *Labour Relations Act* (the "Act") similar to those currently embodied in Section 12 of the Act. As a result, the UPGWA does not admit to membership persons other than security guards nor is it chartered by or affiliated with any organization which admits to membership persons other than guards. In particular, the UPGWA is not a member of the Ontario Federation of Labour, the Canadian Labour Congress, nor any other central labour organization.
>
> 6. In order to maintain its ability to become certified and gain the right to represent security guards, the UPGWA has deliberately organized itself and its activities so as to ensure that it complies with the provisions of s.12 of the *Act*. Because the UPGWA does not represent persons other than security guards, many of the persons employed at a given work location, particularly production employees, are not eligible for membership in or organization by the UPGWA. As a result, many of the bargaining units represented by the UPGWA are quite small, comprising only a fraction of the total employees located at a particular work site.
>
> 7. The largest bargaining unit currently represented by the UPGWA in Ontario is at General Motors. This unit is comprised of approximately 270 security guards. Many of the bargaining units represented by the UPGWA consist of between 20 and 25 employees.

16. The USWA has a total membership of approximately 710,000, of whom about 544,000 are in the United States where it has about 2,400 local unions and 5,000 bargaining units. It has approximately 166,000 members in Canada, where it has about 700 local unions and 1,800 bargaining units. The USWA represents employees in many different industries, including basic steel, automotive parts, textiles, groceries, shipbuilding, mining, furniture manufacturing, machine shops, and nursing homes. As indicated below, it also represents a number of security guards in Quebec and other parts of Canada. The USWA bargaining units vary in size from two employees to in excess of five thousand employees. The average USWA bargaining unit consists of less than one hundred emplovees and many of its units have less than thirty. It has formed a number of

amalgamated locals, each comprised of several bargaining units, to provide better representation for small units while minimizing the associated costs.

17. Each USWA local elects a minimum of five officers every three years. The locals are serviced by USWA staff representatives who are responsible to their respective area supervisors, and to a district director, who determines where staff representatives work and what locals they service. There are three USWA districts in Canada: District 6, which is Ontario; District 3, which is the western provinces, the Yukon, and the Northwest Territories; and District 5, which is the Province of Quebec and the Maritimes. (As a result of the merger of an upholsterers' union with the USWA, there is also an "Upholsterers' Division" of the USWA which is deemed to be a "district" under Article X of the USWA Constitution, and which has its own district director.) The members elect five USWA officers, a national director, and a district director every four years.

18. USWA staff representatives provide assistance in all aspects of the administration of local unions. They give assistance and advice concerning grievances, present arbitration cases, and also provide assistance with respect to health and safety, workers' compensation, collective agreement administration, and collective bargaining. The USWA has a total of fifty staff representatives in Ontario. Its National Office in Toronto also provides locals with access to legal expertise, and information regarding benefits, pensions, job evaluation, education, and other matters. The USWA provides members with a variety of educational opportunities and materials. It also directs 7% of their dues into a strike and defence fund which is available to all members who engage in a strike which has been authorized by the President of the USWA.

19. The USWA is affiliated with the CLC and actively participates in its affairs. All of the USWA locals in District 6 are affiliated with the OFL. In describing the benefits which the USWA derives from its active involvement in the OFL, Mr. Hynd noted that it enables the USWA to work in concert with other unions to lobby and pressure governments for changes in legislation, and to exchange information. USWA leaders and staff also engage in their own governmental lobbying efforts at the municipal, provincial, and federal levels. USWA members are also actively involved in various labour councils in Ontario.

20. The USWA uses a number of "casual organizers" to assist with organizing activities. The remuneration which they receive from the USWA is the equivalent of what they were paid by their employers prior to becoming casual organizers. The USWA also pays their expenses (on the same basis as a USWA staff representative).

21. The USWA represents a total of between 43,000 and 45,000 employees in the Province of Quebec, of whom over 10,000 are security guards. Most of those guards belong to USWA Local 8922, which primarily represents guards employed by security guard agencies such as Pinkerton's and Burns. The parties participating in the instant proceedings agree that throughout 1988-89 and continuing as of January 30, 1990, "some employees of Les Services de Protection Burns International Limitee and some employees of Pinkerton du Quebec Ltee covered by Certificates of the Bureau du Commissionaire General du Travail Gouvernement du Quebec ... and covered by collective agreements with the United Steelworkers of America Local 8922 ... who are employed at various 'client sites' in Quebec, are 'guards' within the meaning of section 12". They further agree that throughout 1988-89 and continuing as of February 23, 1990, "employees of Pinkerton du Quebec Ltee, covered by Certificates of the Bureau du Commissionaire General du Travail Gouvernment du Quebec ... and by a collective agreement with the United Steelworkers of America Local 8922 ..., and who are employed at the site of Sidbec Dosco Ltee in Contrecoeur, Quebec, where United Steelworkers of America Local 6586 also represents production employees in a separate bargaining unit pursuant to a separate collective agreement and a separate certificate and where

United Steelworkers of America Local 8060 represents office and clerical employees in a separate bargaining unit pursuant to a separate collective agreement and a separate certificate are 'guards' within the meaning of section 12". Local 8922 also represents "in house" security guards employed by Produits Chimiques Expro Inc. and by Division CCR Mineraux Noranda Inc. The parties participating in the instant proceedings agree that from June 7, 1989 and continuing as of February 23, 1990, "security guards employed at Division CCR Mineraux Noranda Inc. by the said employer are in a bargaining unit covered by a collective agreement between [Local 8922] and Division CCR Mineraux Noranda Inc." They also agree that USWA Local 6887 represents production employees of that employer in a separate bargaining unit pursuant to a separate collective agreement, and that those security guards are "guards" within the meaning of section 12.

22. Several other USWA Quebec locals also represent security guards. For example, Local 6149 represents security guards employed by Sidbec-Dosco at its Montreal steel mill. The company's other employees at that location are represented by other USWA locals. A similar situation exists in respect of the Sivaco Company, whose security guards at its Marieville plant are represented by Local 8917, and whose production employees at that plant are represented by another USWA local and covered by a separate collective agreement. Another example is Local 7401, which has a collective agreement covering security guards employed by Quebec Cartier Mining Company in certain locations, and also represents that company's office employees in a separate bargaining unit covered by another collective agreement. As part of the aforementioned agreed statement of facts, the parties participating in the instant proceedings are in agreement that throughout 1988-90 and continuing as of February 23, 1990, "security guards employed at Fonderie CSF Division de Hawker Siddeley Canada Inc. by the said employer are in a bargaining unit covered by a collective agreement between [USWA Local 7103] and Fonderie CSF Division de Hawker Siddeley Canada Inc." They also agree that USWA Local 6859 represents production employees of that employer in a separate bargaining unit pursuant to a separate collective agreement, and that those security guards are "guards" within the meaning of section 12.

23. One of the thirteen staff representatives supervised by Mr. Audette devotes most of his time to servicing Local 8922, which is also assisted in arbitration proceedings by other USWA staff representatives from time to time. During the period from 1983 to 1986, Mr. Audette served as the co-ordinator for the USWA services to security guards, including those represented directly by the USWA and those represented by the Union of Quebec Security Guards, which entered into service contracts with the USWA under which the USWA provided various services to its members in return for a monthly payment. Local 8922 subsequently displaced the Union of Quebec Security Guards as the bargaining agent for most of the guards which had previously been represented by the latter union. Two employers' associations (A.S.I.E.Q. and C.A.S.I.Q.) bargain with Local 8922 in respect of guards employed by the various security guard agencies which belong to one or the other of those associations. Those negotiations result in a single collective agreement.

24. In the Province of Quebec, all security guards employed by a security guard agency are covered by a decree (the "Decree"), the origins and purpose of which are described as follows in a booklet published by the Security Guards' Parity Committee (and entered as Exhibit 43 in these proceedings):

> Since 1934, the provincial Act respecting collective agreement decrees has allowed the parties entering into a collective agreement to request that the government extend to all employers and employees of a given sector certain provisions contained in the agreement.
>
> The agreement itself is negotiated between employers and employees. Not all of the provisions constituting the collective agreement are included in the decree, but mainly those concerning monetary matters: wages, holidays and leaves, overtime, etc. In asking for a decree, the con-

> tracting parties aim to prevent disloyal competition from other employers who might not be governed by a collective agreement.
>
> In the sector of security guard agencies, a decree first came into effect on August 13th, 1980, for Quebec City and area, and a second one on April 15th, 1981, for Montreal and area. In February 1984, the two decrees were combined into a single one, which has since applied to all Quebec security guard agencies and to their employees.
>
> The collective agreement entered into in 1986 by the two employers' associations, CASIQ and ASIEQ, on the one hand, and by the Union des agents de securite du Quebec, Metallurgistes Unis d'Amerique, local 8922 (FTQ), on the other hand, again served to modify the decree. The decree made it possible to negotiate better terms without placing either party in a disadvantageous position with respect to the competition.
>
> The Act respecting collective agreement decrees also stipulates that the contracting parties set up a joint committee to supervise the implementation of the decree. All employers, as well as all employees, whether unionized or not, are subject to the decree and they must contribute to the financing of the joint committee's operations.
>
> The Security Guards' Parity Committee is headed by a board of directors made up of six employers' representatives, appointed by their two associations, and six union representatives, appointed by the two unions. The board of directors in turn appoints a general manager who, together with staff of inspectors and office personnel, maintains the committee in operation and ensures application of the decree.

25. The decree system applies not only to security guards but also to various other employees such as construction workers. If the Quebec Minister of Labour is satisfied that a collective agreement has acquired a preponderent significance and importance, and that it applies to a sufficient number of persons, some or all of its monetary provisions may be extended, at the request of the parties to the collective agreement, to all of the employees in the industry in a particular area (or throughout the Province) by means of a decree. (In the case of security guards, this initially occurred in the context of a collective agreement negotiated by the Union of Quebec Security Guards in 1980. The USWA became involved three years later after it displaced that union as the bargaining agent for a number of security guards in the Montreal area.) Once a decree has been obtained, it may be amended at the request of the parties. After they have concluded their negotiations and entered into a renewal agreement, the parties decide which of its provisions they wish to request the Quebec Minister of Labour to include in the decree. After that request has been approved (or amended) by the Cabinet, the decree is published in the Official Gazette and becomes legally binding on all employers in the industry throughout the area to which the decree pertains. It is intended to provide a "level playing field", and to thereby prevent unionized security agencies from being undercut by firms whose employees are not represented by a union.

26. The Decree applies to security guards employed by security agencies which supply guards to clients. It does not apply to companies (such as Noranda, Sidbec-Dosco, and Sivaco) which employ their own "in house" guards. The Decree specifies certain minimum standards, and does not prevent Local 8922 from negotiating terms and conditions of employment that are superior to those contained in the Decree. Moreover, Local 8922 has negotiated seniority, grievance, arbitration, leave of absence, health and safety, and various other provisions which do not form part of the Decree and, accordingly, apply only to security guards covered by the collective agreement. Most of the USWA's locals in Quebec, including Local 8922, are affiliated with the Quebec Federation of Labour, which is the largest central labour body in that province.

27. The USWA also represents security guards in some other provinces. On December 11, 1986, the Newfoundland Labour Relations Board certified USWA Local 6480 as the bargaining agent for "a unit of employees of Metropol Security Limited, St. John's comprising Security

Guards save and except supervisor employed at Wabush Airport, Labrador", and those parties entered into a three-year collective agreement in respect of that unit on June 24, 1988. On January 30, 1989, the British Columbia Industrial Relations Council certified USWA Local 2952 as the bargaining agent for security guards (except those excluded by the *Industrial Relations Act*) employed by Major Security Inc. at the Cassiar mine site, and those parties subsequently entered into a collective agreement effective from May 1, 1989 to November 30, 1991. It is common ground among the parties participating in the instant proceedings that throughout 1989 and continuing as of January 30, 1990, the employees of Major Security Inc. covered by that certificate and by that collective agreement were "guards" within the meaning of section 12. They are also in agreement that the USWA "represents production and office/clerical/technical employees" at that mine site pursuant to separate collective agreements. On December 1, 1989, the Manitoba Labour Board certified the USWA as bargaining agent for "all employees of Metropol Security Limited, employed at the City of Thompson, in the Province of Manitoba, except two (2) Class 6 Supervisors, Managers and those excluded by the Act." Inco's security guard functions in Thompson are performed by personnel covered by that certificate who are provided to Inco by Metropol pursuant to a contract between them. The parties participating in the instant proceedings agree that in 1989 and continuing as of January 30, 1990, employees of Metropol Security Limited (Thompson Division) covered by that certificate and employed at Inco's Thompson mine site, where the USWA represents production employees pursuant to a collective agreement which does not cover security guards, were "guards" within the meaning of section 12.

28. The USWA also represents some security guards whose employers' labour relations fall under federal jurisdiction. On December 20, 1988, the Canada Labour Relations Board certified the USWA as bargaining agent for all security officers of Rio Algom Limited at its Elliot Lake Sites (excluding deputy-chief security officer and those above that rank). USWA Local 5980 subsequently entered into a collective agreement covering "all of the security officers of the Company at its Quirke Section, Panel Section, Stanleigh/Milliken Section, Plaza Section, Nordic Section (includes Housing), in the District of Algoma." The parties participating in the instant proceedings agree that throughout 1989 and continuing as of January 30, 1990, employees of Rio Algom Limited covered by that certificate and that collective agreement at the company's mine site in Elliot Lake, where the USWA "represents production and office/clerical/technical employees pursuant to separate collective agreements", were "guards" within the meaning of section 12.

29. Mr. Deans attended Carleton University (the "University") as a full-time student in 1983 and 1984. During the summers of 1982 and 1983, he was employed by the Public Service Alliance of Canada ("PSAC") and thereby became familiar with some of its operations and educational materials. He commenced employment with the University in July of 1984 as a security guard. His responsibilities in that position included the general "policing" of the campus to prevent vandalism, theft, assault, and other crimes; investigating unlawful incidents which occurred on campus; providing first aid; directing new students and campus visitors to various locations; and ensuring the general protection of persons and property at the University. After completing his probationary period, Mr. Deans became active in the affairs of his bargaining agent, CGA Local 103. He was elected as Local 103's Secretary-Treasurer in November of 1984 and initiated a grievance which was the first one in twelve years to be arbitrated by the Local. No assistance was received from the CGA in respect of that arbitration because no one from the CGA serviced Local 103. As a result of his involvement in the activities of the Local, Mr. Deans formed the opinion that the CGA needed to expand and develop, but would be unable to do so on its own because of its lack of resources and expertise.

30. The majority of the employees at the University, including support staff, buildings and grounds staff, teaching assistants, and tradesmen, are represented by the Canadian Union of Pub-

lic Employees ("CUPE") through three locals. (Heating plant employees are represented by the Canadian Union of Operating Engineers, and print shop employees are represented by a graphics union.) Through his presence on campus, Mr. Deans became familiar with CUPE's operations at the University, and the manner in which CUPE representatives assisted with collective bargaining and otherwise serviced the locals. He also became aware that CUPE had a library of labour relations materials in its office at the University.

31. In April of 1985 Mr. Deans attended the Annual Meeting of the CGA's National Executive Board and Council as a delegate from Local 103. (The Council consists of delegates from the various CGA locals. The number of delegates to which a particular local is entitled depends upon the size of the local.) After CGA President R. Butler expressed a desire to have a committee formed to look after union education, Mr. Deans moved that a committee of three members be formed for that purpose. He also offered to become a member of that committee and to obtain documents, pamphlets, and other educational materials to assist CGA members. He was aware of the existence of such materials from his summer employment with PSAC.

32. At the October 5, 1985 General Business Meeting of the CGA National Executive Board and Council, Mr. Deans suggested that a CGA library be set up containing educational materials from other unions, and information about grievances and arbitration awards. That suggestion was well received, and a motion was passed whereby the duties of the CGA Vice-President were expanded to include those of an education officer responsible for accumulating such a library and disseminating information at National Executive Board and Council meetings.

33. At the end of 1985 Mr. Deans resigned from his position as Secretary-Treasurer of Local 103 in order to concentrate on assembling documents and information for dissemination at the Annual Meeting of the CGA's National Executive Board and Council in the Spring of 1986. At an educational seminar that was held in conjunction with that meeting, Mr. Deans presented the educational manual which he had prepared over the preceding months.

34. Mr. Deans became the Secretary-Treasurer of the CGA by acclamation at that Annual Meeting. He used that position to advocate the provision of better service to the locals, and to encourage the membership to become more educated in labour relations matters. CGA national officers had traditionally been involved only in certification applications, section 89 complaints, and first contract negotiations. However, after becoming the CGA's Secretary-Treasurer, Mr. Deans went out to the locals to assist them with grievances, arbitrations, and collective bargaining for renewal agreements. With the exception of some "flack" that he received from Local 111 which represented guards at the University of Western Ontario, Mr. Deans' efforts to provide greater service were well received at the local level. However, those activities proved to be very expensive for Mr. Deans, who also encountered difficulties in obtaining time away from the University to perform those functions. He also felt that the servicing which he was able to provide with his limited resources and self-taught knowledge was "a long way from where it should have been", although he recognized that it was better than the dearth of servicing which had preceded it.

35. During the Fall of 1986, in an attempt to obtain better servicing for CGA members, Mr. Deans approached Ed Johnson, who at that time was the Director of Organizing for the CLC, to discuss the potential for CGA affiliation with that central labour body. Mr. Deans was aware of the existence of the UPGWA but did not contact that organization because he knew that it did not have a very large membership, and because he had formed the opinion from talking to CGA members who had previously been represented by it that the UPGWA was in no better position to service its members than was the CGA.

36. When Mr. Johnson raised section 12 of the Act early in his conversation with Mr.

Deans, the latter sought to discover if there was any way around that provision, or any way in which the CGA could draw upon Mr. Johnson's expertise and experience in labour relations. Following a lengthy discussion, Mr. Johnson introduced Mr. Deans to Donald MacDonald, a CLC official whose job involved servicing locals and district labour councils by bargaining collective agreements, presenting grievances, and conducting arbitrations. In the numerous meetings which followed that introduction, Mr. MacDonald served as a source of information for Mr. Deans concerning grievances and other labour relations matters. Mr. MacDonald also attended a conciliation meeting held in relation to the CGA's negotiation of a collective agreement renewal in respect of the security guards employed by Citicom Inc. at the Rideau Centre in Ottawa. Mr. Deans was of the view that Mr. MacDonald's involvement in that meeting resulted in an agreement which the CGA would not otherwise have obtained.

37. During the Spring of 1987, Mr. Deans and Mr. MacDonald discussed the possibility of the CGA entering into a service contract with the CLC under which the latter would provide technical support services to the CGA, its locals, and its members, in return for a fee. Although Mr. MacDonald did not entirely rule this out as a possibility, he did indicate that the CLC was "getting out of the business of servicing". Mr. MacDonald also advised Mr. Deans that if there was a successful challenge to section 12 and the guards came to be represented by a local directly chartered by the CLC, the CLC would consider putting them with the appropriate union which, he suggested, would be the USWA in view of its success in representing security guards in Quebec.

38. Mr. Deans also testified about what he understood to be the problems that Local 105 was encountering in dealing with Inco. In his discussions with Gary Hall, the President of Local 105, and Jerry Switch, one of Local 105's three Vice-Presidents, Mr. Deans was advised that Local 105 was encountering difficulties with collective bargaining and with grievances which it could not afford to arbitrate. Local 105 requested financial assistance in respect of five potentially arbitrable grievances, but the CGA was unable to provide any as it had even less money than the local. After explaining how he had been able to obtain some assistance from CUPE (at Carleton) and from the CLC, Mr. Deans suggested that Messrs. Switch and Hall take advantage of their proximity to the USWA in Sudbury by contacting Bruce McKeigan, a USWA Staff Representative whom they knew to have taught an education seminar. This led to some communications between the Executive of Local 105 and the USWA.

39. At a meeting of the CGA National Executive Board on Friday evening September 11, 1987, Mr. Switch, who in addition to being a Vice-President of Local 105 was also a trustee of the National Executive Board, made a presentation which was summarized by Mr. Deans as follows in the minutes which he prepared of that meeting:

> J. Switch, acting in the capacity of First Vice-President of Local 105, made a formal presentation to the National Executive Board concerning a service contract and an eventual affiliation with the United Steelworkers of America.
>
> At the Annual Meeting held in Sudbury in April of 1987, an education seminar was arranged through the Canadian Labour Congress and was taught by Mr. Bruce McKeigan who is employed by the United Steelworkers of America Local 6500. It was quite apparent to the representatives of CGA Local 105 that this is the sort of service that should be provided to all members of the Canadian Guards Association. It would be impossible to assume that it would be feasible for our Association to provide this and many other services on a continual basis without the support and assistance of some other large Union.
>
> J. Switch approached the United Steelworkers of America in an attempt to obtain the services of the Steelworkers. The Steelworkers were extremely receptive to the needs of Local 105 who face approximately five arbitrations in the near future as well problems at upcoming negotiations since the Canadian Guards Association carried little or no clout at all. There still posed

> one problem regarding an affiliation with the Steelworkers, that being s. 12 of the Ontario Labour Relations Act. To side step this problem for the moment, a service contract involving two phases was formulated.
>
> J. Switch explained that phase one involves a "fee for service" which would side step s. 12 and would provide the Canadian Guards Association with the full services of the United Steelworkers of America. Phase two involves the formal integration of the CGA and the USWA whereby the USWA would spend a minimum of $250,000.00 in court fees to challenge s. 12 to allow for a clean merger of the two Unions. The idea is that we will always maintain our identity by becoming "The Canadian Guards Association, A Division of the United Steelworkers of America".
>
> In the interim, until such a formal integration of the two Unions could occur, there would exist a service contract between the CGA and the USWA. This would require the National to pay a fee to the USWA to obtain the full services of the USWA, i.e., professional and technical services required in collective bargaining, the servicing of the Collective Agreement by a staff representative, providing an advocate for arbitration hearings, assisting CGA members in workers compensation and unemployment insurance problems, research from the Union's Research Department, legal advice from the Union's Legal Department, education services, having equal right to all staff representative time and energy as if CGA Locals were USWA Locals, and the list goes on and on. The USWA currently represents 13,000 + security guards in the Province of Quebec and over the last five years have managed to increase their overall benefits by 50%.
>
> It is the position of CGA Local 105 that it would be in the best interests of the Canadian Guards Association to enter into a service agreement with the USWA to provide those services so desperately needed in the immediate future. It would also show the desire of the National Executive board to fulfil the duties and responsibilities expected of a Parent Body which have been neglected for too long. With increased management pressures at the bargaining table coupled with a lack of their desire to properly settle disputes without challenging Unions to bring matters to Arbitration thus depleting or breaking the Unions of their funds, there is no feasible way for the Canadian Guards Association to survive much longer as it currently exists. Therefore, it is Local 105's final position that should the National Executive Council not be in favour of a formal integration of the CGA and the USWA, then they will act in their own best interests.

In his testimony before the Board, Mr. Deans indicated that the minutes are not a verbatim record of what was said, but use paraphrasing to capture the ideas that were expressed. He further testified that Mr. Switch presented what the National Executive Board considered to be an ultimatum that if the CGA did not enter into a service contract with the USWA, Local 105 would either do so itself as a local of the CGA, or decertify and do it by other means.

40. In the general discussion which followed Mr. Switch's presentation, Mr. Deans and the other members of the National Executive Board concluded that it would be desirable to explore the concept which he had presented. Mr. Deans felt that it was directly in line with the direction in which the CGA had been attempting to go, and viewed entering into such a contract as a means of fulfilling the objective set forth in Section 4 of Article 2 of the CGA's Constitution. Following that general discussion, the meeting recessed for the evening.

41. When the meeting of the CGA National Executive Board resumed the following morning, Leo Gerard, the Director of District 6 of the USWA, made a presentation concerning a proposed service contract and an eventual formal integration of the CGA into the USWA. Mr. Gerard's presentation was summarized as follows by Mr. Deans in the minutes which he prepared of that meeting:

> Mr. Gerard explained that the USWA have seen the benefits derived from such an arrangement through their efforts in the Province of Quebec by means of their Political influence to change legislation. The one Local of the USWA which represents security guards in Quebec is ironically enough their largest single Local in Canada which has roughly 13,000 members.
>
> Mr. Gerard presented a "Confidential" Discussion Paper which specifically outlined the terms

and conditions and expectations of the two phases of the service contract and eventual integration of the two Unions. Mr. ,Gerard went through the Paper and their [sic] was open discussions on its content. Mr. Gerard stressed that this Discussion Paper was to remain "Confidential" at least for the time being since it may be entered into evidence in front of the Labour Board to show the true and honest intentions of both parties.

Mr. Gerard explained that there would have to be a major re-structuring of the CGA since it would be impossible for us to function effectively or administratively with such small Locals. Mr. Gerard explained that they have completed research which shows a potential of between 30,000 and 35,000 members in Ontario alone. This arrangement would drive out all the small fly by night security outfits and keep the legitimate companies around. The USWA would like to take one of our Locals and use it as a test case to be the successor group which Local 105 would be the most suitable. [sic] The Labour Board should turn down the USWA's application for successor rights by virtue of s. 12. The USWA would then launch a legal challenge on the constitutional validity of s. 12.

Mr. Gerard wanted to make it quite clear to us and the membership that no one is being pushed into anything. This sentiment will be constantly reiterated when, with the assistance of the National, representatives of the USWA get out to meet with the membership of each Local and become actively involved and supportive in such manners as mentioned earlier. Mr. Gerard also wanted to stress that the relationship would be mutually beneficial and at the choice of the CGA membership.

Mr. Gerard thanked the Board for their time and hoped this would be the beginning of a warm and fraternal relationship between the USWA and the CGA.

Mr. Gerard left the meeting and there was a general discussion amongst the members of the Board before a recess at 1:00 p.m.

42. The "Discussion Paper" which Mr. Gerard presented at that meeting reads as follows:

DISCUSSION PAPER

CONFIDENTIAL

UNITED STEEL WORKERS OF AMERICA AND CANADIAN GUARDS ASSOCIATION

This document is designed to outline the basis for discussions between the United Steelworkers of America (U.S.W.A.) and the Canadian Guards Association (C.G.A.). The ultimate goal of the discussions is to establish a warm and fraternal relationship between the U.S.W.A. and the C.G.A. so that both can work together towards a formal integration of the C.G.A. as part of the U.S.W.A. or as a division of the U.S.W.A. This discussion paper focuses on a two-phase process of developing the relationship between the C.G.A. and the U.S.W.A. Phases I and II will last for four years and may be extended.

PHASE I

Service Contract

1. The U.S.W.A. and C.G.A. will negotiate a service contract. This contract will be highlighted by the following features:

    a) The contract will run for four years.

    b) The U.S.W.A. will provide professional and technical service to the C.G.A. identical to the services provided by the U.S.W.A. to its chartered locals. These services will include: collective bargaining assistance, servicing the collective agreement by a staff representative, providing an advocate for arbitration hearings, meeting with the employer on behalf of the C.G.A. during the life of collective agreements, assisting C.G.A. members

in workers' compensation and unemployment insurance problems including appearing before tribunals on behalf of C.G.A. members, economic research from the union's Research Department, legal advice from the union's Legal Department, educational services, public affairs services, etc. The C.G.A. locals shall be considered as having an equal right to all staff representative time and energies as if they were U.S.W.A. locals. The U.S.W.A. will develop specialist staff representatives in Ontario with expertise in security guard negotiations.

c) The C.G.A. will pay the U.S.W.A. at the end of each calendar month a service fee which will equal the average amount of District 6 (Ontario) U.S.W.A. union dues retained by the U.S.W.A. for administration of the U.S.W.A. on a per capita basis multiplied by the number of members of the C.G.A. employed for more than five days for the month. The C.G.A. shall provide a breakdown for each monthly cheque paid to the U.S.W.A. for the service contract.

d) The C.G.A. shall establish a strike and defense fund and shall remit to such fund the average amount of District 6 (Ontario) U.S.W.A. union dues retained by the U.S.W.A. for the U.S.W.A. Strike and Defense Fund on a per capita basis multiplied by the number of members of the C.G.A. employed for more than five days for the month. The C.G.A. Fund shall be under the exclusive control of the C.G.A. and the C.G.A. shall remit to the U.S.W.A. from such fund the per capita amount for each member as members become formally part of the U.S.W.A. under Phase II.

e) As the service agent for C.G.A. locals, U.S.W.A. staff representatives shall not execute any collective agreement with any employer on behalf of the C.G.A. All such collective agreements shall be executed by C.G.A. in accordance with its current practice.

f) During the life of the service agreement or any extension to it the C.G.A. shall assist the U.S.W.A. in becoming known to the members of the C.G.A. and the C.G.A. shall co-operate with the U.S.W.A. in complying with the successor union provisions of the Ontario Labour Relations Act or in arranging for C.G.A. members to sign U.S.W.A. membership cards during the last two months of a C.G.A. collective agreement, but no application for certification/displacement with respect to a C.G.A. bargaining unit or application for successor status with respect to a C.G.A. bargaining unit shall be filed until the end of the first year of the service contract so as to afford the C.G.A. a reasonable time to evaluate the services provided and to terminate the service agreement if it so chooses.

g) After the expiry of the first year of the service contract, the U.S.W.A. shall decide if and when to file any applications for certification or applications for successor status.

h) To facilitate final discussions, the C.G.A. shall provide the U.S.W.A. with a list of all bargaining units of the C.G.A., the names and addresses of all employers with whom the C.G.A. have collective agreements, the number of employees in each C.G.A. bargaining unit and copies of each C.G.A. collective agreement.

i) In the event that either the U.S.W.A. or the C.G.A. is not content with the operation of the service agreement, there shall be discussions to resolve differences in the spirit which binds the organizations. In the event that either the C.G.A. or the U.S.W.A. desires to terminate the service agreement, the agreement shall be terminated upon written notice of not less than three months during which time both organizations shall continue to comply with the service agreement.

LEGAL CHALLENGE

2. In the event that any employer objects to any U.S.W.A. application for certification/displacement or application for successor status filed with the aid and assistance of the C.G.A. on the basis of section 12 of the Ontario Labour Relations Act, the C.G.A. will join the U.S.W.A. in any and all legal proceedings to challenge the application and/or constitutional validity of section 12 of the Act. The C.G.A. and the U.S.W.A. shall be represented by legal counsel selected by the U.S.W.A. and the U.S.W.A. shall be responsible for all fees with respect to such legal counsel.

PHASE II

3. The highlights of Phase II are as follows:

   a) Phase II will begin after the first year of the service contract and will expire at the end of the service contract or any extension of it.

   b) The purpose of Phase II is to integrate the C.G.A. into the U.S.W.A. and to preserve the special identity of the C.G.A. as part of the U.S.W.A. This can be accomplished by special terms on merger or by maintaining the C.G.A. as a division of the U.S.W.A. The discussions between the two organizations will focus on the best arrangements to meet their respective requirements.

   c) During Phase II the C.G.A. will do everything it can to assist the U.S.W.A. in becoming the bargaining agent for C.G.A. bargaining units including planning the appropriate strategy for delivering to C.G.A. members information about the U.S.W.A.

   d) During Phase II the C.G.A. and the U.S.W.A. will work together to organize new locals of the C.G.A. which locals will be phased into the U.S.W.A. in accordance with Phase II. The U.S.W.A. shall be responsible for all lost time and expenses of any C.G.A. member or official assigned by the U.S.W.A. District 6 Director to work with the U.S.W.A. on any organizing campaign, displacement and/or application for successor union.

   e) The U.S.W.A. and C.G.A. recognize that at some time during Phase II the C.G.A. lose [sic] its independent legal existence but that the C.G.A. will become part of the U.S.W.A. in accordance with the Phase II process.

4. Apart from providing staff representative service as outlined above, the U.S.W.A. shall provide to the C.G.A. the use of U.S.W.A. offices throughout Ontario at no cost to the C.G.A.

5. In the event that the C.G.A. and U.S.W.A. fail in their challenge to section 12 of the Labour Relations Act the service agreement may be renewed at the expiry of four years.

In commenting on the confidentiality of that document, Mr. Deans testified that it was Mr. Gerard's position that the Discussion Paper was not to be "confidential" in relation to CGA or USWA members, but only in relation to other unions.

43. When the National Executive Board meeting reconvened later that afternoon, the following two motions were carried unanimously, following a discussion of the pros and cons of the arrangements proposed by Mr. Gerard:

> Motion #198 - moved by G. Switch, seconded by S. Deans that the National Executive Board enter into a Service Contract on behalf of the Canadian Guards Association with the United Steelworkers of America which fees for service shall not exceed the monthly per capita tax remittance paid by the membership of the Canadian Guards Association until such time as this

amount is re-adjusted by a two thirds majority of voting members present at a meeting of the National Executive Board and Council.

Motion #199 - moved by R. Clarke, seconded by G. Switch that the President and Secretary-Treasurer of the National Executive Board shall be empowered to make any and all arrangements, provide any and all information or documents and actually enter into and execute a formalized binding service contract between the Canadian Guards Association and the United Steelworkers of America.

44. In October of 1987, CGA President Ron Gilchrist and Mr. Deans met with Mr. Shell in Toronto and negotiated the terms of a draft service contract. A Special Meeting of the CGA National Executive Board and Council was held on December 4, 1987. At that meeting, Mr. Gilchrist gave a report on the draft service contract. His report was followed by a presentation by Mr. Gerard and Mr. Shell concerning the USWA's objectives in seeking to enter into a service contract with the CGA, the benefits which were expected to result, and the legalities of the proposed arrangements. They also responded at length to a number of questions posed to them. Following a lengthy debate, a motion was passed amending the CGA By-laws to increase the per capita union dues to one and one-half hours' pay per month. This was done in order to ensure that the National Executive Board and the locals would still have some funds available to them after payment of one hour's pay to the USWA under the proposed terms of the service contract. Following the defeat of a motion to amend the CGA Constitution to empower the CGA to merge with the USWA (subject to certain conditions, if approved by a two-thirds vote of the National Executive Board and Council), a motion was passed empowering the National Executive Board "to sign the service agreement with the USWA when it has first received a favourable opinion from the Association's solicitor and when it is satisfied by a majority decision of Board members." Pursuant to that motion, a copy of the draft service contract was given to Stephen McDonald, the CGA's solicitor, who negotiated a number of revisions.

45. On February 12, 1988, the CGA and the USWA entered into the following contract (the "Service Contract"), which incorporated the revisions that had been negotiated by Mr. McDonald:

SERVICE CONTRACT

between

UNITED STEELWORKERS OF AMERICA

(hereinafter "USWA")

and

CANADIAN GUARDS ASSOCIATION

(hereinafter "CGA")

WHEREAS the USWA and the CGA desire to enter into this Service Agreement so as to improve the quality of the working lives of all members of the CGA; and

WHEREAS the USWA and the CGA desire to develop a relationship which will result in the integration of the CGA into the USWA in a manner which preserves the identity of the CGA as part of the USWA;

NOW THEREFORE the USWA and the CGA, in consideration of their mutual promises, agree as follows:

1. This Service Contract shall be effective from October 1, 1987, to September 30, 1991.

2. The USWA shall provide all support and technical services to the CGA and to its members which the USWA provides to its own chartered local unions and to its own members.

3. In addition to the services outlined in paragraph 2, above, the USWA shall make available to the CGA the USWA offices in Ontario.

4. Commencing January 1, 1988 the CGA shall pay to the USWA at the end of each calendar month a Service Fee to be the total of the following:

   Per member of the CGA or any of its locals who have worked for more than five days during the calendar month, the fee shall equal a total of one hour's pay based upon each member's total earnings during the calendar month provided the payment for each member by the CGA to the USWA shall not be less than Five dollars ($5.00) per member per calendar month.

5. USWA employees and agents shall not execute any documents, including any collective agreements, on behalf of the CGA.

6. The CGA shall hold the USWA harmless with respect to any act or omission performed by any employee or agent of the USWA in the course of such person providing services to the CGA in accordance with the terms of this Agreement, if performed in good faith.

7. At least one employee or agent of the USWA shall be invited to attend every meeting of all locals of the CGA and shall be entitled to participate in such meetings but shall not be entitled to vote on any matter.

8. The CGA shall cooperate and support the USWA in complying with all sections of the Ontario Labour Relations Act (hereinafter "the Act") in the event that the USWA decides to seek to become the legal bargaining agent with respect to any or all locals of the CGA. It is expressly acknowledged that this may occur by way of applications under the successor union provisions of the applicable statute or by way of displacement application for certification filed with the Ontario Labour Relations Board or the Canada Labour Relations Board, as the case may be. It is also expressly understood and agreed that no such application shall be filed prior to October 1, 1988 so as to afford the CGA a reasonable opportunity to evaluate the services provided by the USWA in accordance with this Agreement.

9. In the event that any employer objects to any USWA displacement application for certification or any USWA application under section 63 of the Act filed with the Ontario Labour Relations Board as aforesaid in paragraph 7 above, the CGA expressly agrees that it will join with the USWA in any and all legal proceeding to challenge any such employer objection on any grounds including the constitutional validity of section 12 of the Act. The USWA expressly agrees that it shall be responsible for all fees with respect to legal representation in any such proceeding and the CGA expressly agrees that both the CGA and the USWA shall be represented by legal counsel selected by the USWA. CGA may appoint its own legal counsel at its own cost. USWA shall reasonably consider any request by CGA to name the legal counsel acting on the application.

10. Before February 1, 1988, the CGA shall provide the USWA with a complete list of all the bargaining units of the CGA including the names and addresses of all employers with whom the CGA have collective agreements, the number of employees in each CGA bargaining unit, as well as with copies of each CGA collective agreement and, where possible, a list of the names, addresses and telephone numbers of all members of the CGA. This material shall be updated on January 15, April 15, July 15 and October 15 of each year and forwarded to the USWA by not later than thirty days following each date as aforesaid.

11. The USWA and the CGA both recognize that during the life of this agreement the

> CGA and for [sic] its locals may lose their/its legal existence and that it/they may become part of the USWA but that the integration of the CGA and/or any of its current locals into the USWA will be accomplished by maintaining the CGA's independent identity even after the integration.
>
> 12. In the event that the CGA and the USWA cannot be integrated as aforesaid because of the determination by the Ontario Labour Relations Board or by any court, the USWA and the CGA expressly agree that this service agreement will be subject to renewal negotiations commencing on June 15, 1991.
>
> 13. Subject to paragraph 14, below, this Agreement may be terminated for any reason whatsoever upon written notice of not less than three calendar months by one party to the other during which time the USWA and the CGA shall continue to comply with this agreement.
>
> 14. The USWA may terminate this Agreement upon one week's notice to the CGA, or four weeks notice if a paragraph 9 application is being processed, if the USWA determines that the CGA has failed to comply with the provisions of paragraph 4, above. Said notice shall be by registered mail and time commences to run the 3rd day after mailing. Termination shall be cancelled by payment within the time period. The time period may only end on a regular business day and extensions shall automatically take effect.

The Service Contract was made retroactive to October 1, 1987 to reflect the fact that the USWA had already begun to provide services to the CGA by that date.

46. In explaining why the USWA entered into the Service Contract and why it has been actively engaged in organizing security guards in Ontario, Mr. Hynd testified that there is a need for a union to represent guards and to provide them with services which have not been provided by the CGA. He further testified as follows:

> The other reason is that we are interested in representing unorganized workers and there's a large, large field of unorganized security guards in Ontario and we have decided that we should be a union to represent the guards in Ontario. One of the reasons for this is our experience of our brothers and sisters in Quebec where they represent guards and have the largest local union in the United Steelworkers of America in Canada, which is a guards local union, and have done, in my view, a very good job of bringing up the living standards of security guards who by and large are underprivileged, underpaid and certainly need a good strong union to represent them.

47. At the end of March of 1988, Mr. Deans received a two-month leave of absence from Carleton University to engage in organizing activities on behalf of the CGA and to service CGA locals. That leave of absence was subsequently extended to include the month of June. During that three-month period, the USWA replaced Mr. Deans' University salary and benefits, paid him a "per diem" to cover meals and other expenses, and paid the hotel and travel expenses which he incurred in respect of union business. Those arrangements, under which Mr. Deans was treated as a member of the USWA's casual staff, resumed when the University, which had denied Mr. Deans a further leave of absence extension, agreed to settle his grievance concerning that denial by granting him a six-month leave of absence. A further requested extension was denied by the University, but Mr. Deans' receipt of compensation from the USWA resumed in the Spring of 1989 after a grievance concerning that denial was successfully arbitrated and resulted in a leave of absence extending until May 30, 1991.

48. At the Annual Meeting of the CGA's National Executive Board and Council on May 5 and 6, 1988, representatives from a number of locals expressed satisfaction with the assistance that was being received from USWA representatives pursuant to the Service Contract. Mr. Deans reported that twelve people had attended CLC weekend courses, and that he and a representative

of Local 115 had attended a USWA weekend education seminar. In his report, President Gilchrist also spoke favourably about the Service Contract and expressed the view that the services supplied under it had assisted many of the CGA locals. He further stated that guidance, direction, and other services supplied by the USWA would provide the CGA with the means to reach its goal of organizing every security guard in Canada, so that a better standard of life could be enjoyed by all. In his brief report, Vice-President R. Clarke indicated that he was extremely pleased with the amount and quality of service afforded the CGA through the Service Contract. R. Philion, a representative of Local 105, presented his local's objections to some of the provisions of the Service Contract. He then moved that the contract be held in abeyance for six months to allow it to be renegotiated with the USWA, and that it be terminated if the USWA refused to accept that proposal. However, that motion was defeated. Mr. Deans subsequently moved that the CGA Constitution be amended by adding the following new article:

Article 7

> The Association may merge with the United Steelworkers of America if approved by a two-thirds majority of the total vote cast by the National Executive Board and Council present and voting at an annual, general or special meeting of the Association, and any objection to any merger vote must be brought forth at a special meeting of the Association which will be called by the National Executive Board after a request for such meeting is filed in writing by a majority of the locals of the Association with the Secretary-Treasurer not later than thirty days after taking of the merger vote objected to.

That motion was carried. During the election of officers which occurred near the end of that meeting, Mr. Deans became the President of the CGA by acclamation.

49. Following the issuance of the aforementioned decision dated June 27, 1988 (in File No. 0068-88-R) in which the Board found the CGA to be affiliated with the USWA in view of their relationship under the terms of the Service Contract, the CGA encountered difficulties in some of its collective bargaining relationships, which difficulties led to a mutual decision by the CGA and USWA to terminate the Service Contract. After Inco objected to Local 105 receiving assistance from a USWA staff representative, those parties entered into an agreement under which collective bargaining for a renewal collective agreement would resume between the CGA and Inco, without prejudice to any position which Inco might wish to take at any time in connection to "any relationship, co-operation, assistance, arrangements, contract, exchange of services or any other activity of any kind whatsoever between the CGA and the USWA." Following the signing of that agreement, no USWA representative negotiated directly with Inco on behalf of the CGA, and the CGA had no difficulties in collective bargaining with that employer.

50. DeHavilland Aircraft Company of Canada also objected to the involvement of a USWA staff representative in CGA Local 101's bargaining for a renewal collective agreement. Following unsuccessful attempts to have that company enter into an agreement similar to the one signed by Inco, Mr. Deans personally conducted negotiations with DeHavilland, at considerable inconvenience to himself.

51. Attempts by CGA Local 114 to negotiate a renewal collective agreement in respect of guards employed by Pinkerton's in Sudbury were completely unsuccessful because Pinkerton's took the position, on the advice of counsel, that due to section 12 of the Act and the affiliation of the CGA with the USWA, it was not required to bargain collectively with the CGA.

52. The CGA was also encountering difficulties with some of its locals. In June of 1988, The University of Western Ontario Police Association displaced CGA Local 111 as bargaining agent for "university police officers" employed by the University of Western Ontario. In November of

that year, the University of Guelph Police Association displaced another CGA local as bargaining agent for the University of Guelph "Special Constables". Because he was aware that there were increasing problems within Local 105 as a result of some of its members' dissatisfaction with provisions of the Service Contract, in June of 1988 Mr. Deans wrote a letter to G. R. Benedetti, the second Vice-President of Local 105, in which he set out a chronology of the events which led to the formulation and signing of the Service Contract. In the following month, Mr. Deans wrote a further letter to Mr. Benedetti in which he expressed his belief that most of the internal conflict in Local 105 stemmed from "improper information and belief and could be resolved through the exchange of vital information and concerns." In that letter he also requested an invitation to attend Local 105's September membership meeting to provide the members "with the necessary information to make an informed judgment as to the future of the CGA and the role they could play." When he was granted an opportunity to address Local 105's membership at its September 13, 1988 meeting, Mr. Deans reviewed in chronological order the events which had led to the Service Contract and described how it had functioned. He also spoke about the CGA's application for certification in respect of Pinkerton's, the Board's decision dated June 27, 1988 in that matter, and the Charter challenge in respect of section 12. He told them that it was not proper for a CGA local to use CGA funds and meeting time for the purpose of decertifying. He also explained what their rights were under the Act, and indicated that a displacement application would be more appropriate than a decertification followed by a "recertification" because of "the danger of decertifying and being left with nothing". After stating that Local 105 had played a very significant role in the CGA since 1973 and that it could continue to do so in the future, he expressed the view that the Local's internal problems could be resolved by providing the members with appropriate information and eliminating their misconceptions.

53. The Executive Officers of Local 105 resigned from their positions later that month and new Executive Officers were subsequently elected. No application for termination of Local 105's bargaining rights was filed. However, in April of 1989 Local 105 filed with the Board a complaint under section 89 of the Act (File No. 0413-89-U) in which it alleged that it had been dealt with by the CGA "National Office" contrary to section 12 of the Act in that the CGA remained "directly and indirectly affiliated with an organization that admits to membership persons other than guards". In a decision dated May 29, 1989, that complaint was dismissed by another panel of the Board on the grounds that section 12 does not create a substantive "offence" for which redress may be sought under section 89.

54. The Service Contract remained in force until November 7, 1988, when it was terminated on the mutual agreement of the CGA and the USWA. (For the purposes of the applications for certification to which these proceedings pertain, Mr. Shell has conceded that the affiliation which the Board found to have been created by the Service Contract continues to exist.) The termination of the Service Contract was motivated by a desire to avoid the difficulties which CGA locals had been encountering in seeking to negotiate collective agreement renewals. During the period that the Service Contract was in force, approximately 1,500 new members joined the CGA. When he approached prospective members, Mr. Deans told them about the Service Contract and the USWA involvement in representing guards in the Province of Quebec, if they were not already aware of it.

55. After the Service Contract was terminated, Mr. Deans continued to organize guards, but used USWA membership cards rather than CGA cards because he was of the opinion that the absence of the Service Contract greatly diminished the chances of further organizing success through the CGA, and because signing people directly into the USWA eliminated the need for any future merger proceedings between the CGA and the USWA in respect of those persons. Mr.

Deans also continued to service CGA locals, with the assistance of USWA legal and secretarial services.

56. At a Special Meeting held on May 4, 1989 immediately prior to the 1989 Annual Meeting of the CGA National Executive Board and Council, the CGA's Constitution and By-laws were amended to give representatives of members in units for which certification applications were pending an opportunity to participate in the affairs of the CGA by acknowledging the status of their "interim bargaining units", and allowing them to vote on all matters discussed at an annual meeting except dues increases. The merger provision in the CGA Constitution was also amended at that Special Meeting to read as follows, in response to concerns raised by Locals 103 and 105:

> A local may merge with the United Steelworkers of America if such merger is approved by a majority of the total vote cast by its members at an annual, general or special meeting of a local for which notice has been given to all its members.
>
> An interim bargaining unit which has been granted an Acknowledgement of Status pursuant to Article 6 of this Constitution may merge with the United Steelworkers of America if such merger is approved by a majority of the total vote cast by its members at an annual general or special meeting of an interim bargaining unit for which notice has been given to all its members.

57. At the Annual Meeting of the CGA's National Executive Board and Council which followed that Special Meeting, a representative from Local 105 reported that the membership of that local remained adamantly against any affiliation with the USWA. Mr. Hynd attended that meeting as a guest to confirm the USWA's continuing support for the CGA and the Charter challenge to section 12, and its continuing commitment to the organization of security guards.

58. In the Spring of 1989, after becoming aware that a group of guards at Carleton University had formed the Carleton University Security Officers' Association (the "CUSOA") with a view to displacing the CGA, Mr. Deans requested the USWA to attempt to obtain a certificate for that bargaining unit. Mr. Deans was also instrumental in gathering membership evidence on behalf of the USWA in respect of that unit, for which the USWA applied to be certified on June 8, 1989 (Board File No. 0647-89-R). The CUSOA intervened in that application by filing an Application for Certification by Intervener. In a decision dated June 28, 1989, another panel of the Board directed that a three-way pre-hearing representation vote be conducted in that matter (with voters being asked whether they wish to be represented by the CUSOA, the USWA, or the CGA). That decision also directed that the ballot box be sealed and that the ballots not be counted pending further order, in view of the section 12 issue raised by the University and in view of the unresolved question of whether the CUSOA is a trade union. In the instant proceedings, Mr. Deans testified that, as a guard employed by Carleton University, he wants to have the USWA as his bargaining agent. He also expressed the view that if this Charter challenge fails and he is left with a choice between the CGA and the CUSOA, he might as well be unrepresented because from his experience in the former and his knowledge of the people involved in the latter, he does not think that either one would be able to do any good for him.

59. As indicated above, the Board also heard extensive testimony from Ron Saxton, the individual intervener in File No. 1484-88-R. Mr. Saxton has been employed by the Zoo as a security guard since 1983. In addition to being responsible for loss prevention and investigations, on the day shift security guards employed by the Zoo reunite lost children with their parents and perform some public relations functions by directing visitors to various areas of the Zoo. On the afternoon shift their function is to patrol the Zoo site and perimeter, and to secure the animal holdings and other areas of the Zoo. On the midnight shift they are also responsible for monitoring alarm systems, including the Zoo's fire alarm system.

60. In 1986, UPGWA Local 1962 (the "Local") was certified as the bargaining agent for the Zoo's security guards. Gordon Bull, another of the Zoo's security guards, was elected as the unit's chief steward, and Mr. Saxton was elected as its alternate steward. Since Mr. Saxton had no previous union experience, he obtained guidance from Mr. Bull, who had some prior experience with labour relations matters and the UPGWA. The Local's bargaining committee for its first contract negotiations with the Zoo consisted of Mr. Bull, Mr. Saxton, and the aforementioned Watson Cook. On the day of the first bargaining session in November of 1986, Mr. Cook met with Messrs. Bull and Saxton to discuss the bargaining process and what they hoped to achieve through it. Messrs. Bull and Saxton were of the view that they should seek to obtain most of the language contained in the collective agreement between the Zoo and CUPE, which represented a number of the Zoo's other employees (and had also represented the Zoo's "driver-watchmen" prior to the certification of Local 1962). However, no written proposal was tabled at that first bargaining session, which was terminated after Ms. B. Smith, who was one of the Zoo's negotiators, told them that they should have gotten together and tabled something.

61. With the assistance of CUPE, Messrs. Bull and Saxton subsequently put together a contract proposal, based primarily upon language contained in CUPE's collective agreement with the Zoo (the "CUPE contract"). After that proposal was forwarded to the Zoo, bargaining proceeded in December, January, and March, with a memorandum of settlement being signed on March 26, 1987. That memorandum listed a number of matters which were to be contained in the collective agreement, including "All items previously agreed to."

62. When that memorandum was signed, the Zoo agreed to prepare a draft copy of the collective agreement and forward it to the Local. There is no direct evidence concerning when Mr. Cook received the draft, although Mr. Saxton was under the impression that Mr. Cook had it in his possession more than a month before he sent a partially illegible copy of it to Mr. Bull by courier in the latter part of May. Following receipt of that document, Mr. Bull resigned from his position as the unit's chief steward.

63. Mr. Saxton thought that the collective agreement was going to contain some language concerning the contracting out of bargaining unit work. He knew that the Zoo had rejected the language proposed by the Local, under which there would be no contracting out of bargaining unit work. He also knew that the Zoo was not prepared to include in a collective agreement with the Local the pertinent article from the CUPE contract, which provided:

> ARTICLE 5 - CONTRACTING OUT OF WORK
>
> 5.01 No employee in the Bargaining Unit shall lose his/her employment because of the contracting out of any work by the Management.
>
> 5.02 Before contracting out any work except major construction work, the Management shall give notice to the Union, in writing of such intention in order that the Union may make representations to the Management on the proposed contracting out.
>
> 5.03 It shall be the policy of the Management to endeavour to place in another position any permanent employee who may be displaced by technological improvements in the operation of the Metro Toronto Zoo.

However, Mr. Saxton was under the impression that Ms. Smith had indicated during negotiations that the Zoo would give the Local the essence of that provision in the form of different language. Thus, he was quite disturbed to find that the draft collective agreement did not contain any such language. He was also of the view that several other items had been omitted or revised by the Zoo.

64. Following some unsuccessful attempts to contact Mr. Cook by telephone, Mr. Saxton

met with Ms. Smith and another of the Zoo's negotiators to seek clarification concerning some items in the draft, and to discuss the absence of language with respect to contracting out. Those discussions resulted in the resolution of all matters about which Mr. Saxton was concerned except contracting out. When that issue was raised with Ms. Smith, she indicated that the Zoo's negotiators had not agreed to give the Local any language about contracting out, and also said that she was surprised that the Local's negotiators had not pursued the matter further at the final bargaining session. As a result of those discussions, Mr. Saxton came to recognize that he might have been mistaken in his belief that Ms. Smith had offered to give the Local language about contracting out. However, he also felt that a contract without such language was unacceptable. Since Mr. Cook had proven to be inaccessible by telephone, Mr. Saxton sent him a registered letter in July of 1987 to inform him about what had occurred and to request him to take appropriate action as soon as possible.

65. Although Mr. Saxton did not receive a response to that letter, the matter finally came to a head at a meeting with the Zoo's negotiators on November 26, 1987, at which Mr. Cook, in accordance with the wishes of Mr. Saxton, refused to sign the collective agreement because it did not contain a clause covering the contracting out of work. The matter was resolved two or three days later through a compromise under which the Zoo agreed to provide the Local with a letter of intent confirming the Zoo's intention to give written notice to the Local before contracting out any major security work, so that the Local could make representations on the proposed contracting out.

66. As a result of his dissatisfaction with the level of service provided by the UPGWA during the first round of negotiations, Mr. Saxton decided to contact the CGA. He telephoned Mr. Deans in March of 1988 and expressed a desire to consider becoming a member of the CGA. During that conversation Mr. Deans told him about the Service Contract under which the USWA was providing the CGA with legal advice, negotiations expertise, and other services. Mr. Deans also suggested that Mr. Saxton contact John Fitzpatrick of the USWA. After meeting with Mr. Fitzpatrick and another USWA official to discuss those services and to obtain CGA membership cards, Mr. Saxton called a general meeting of the bargaining unit at which he described what he perceived to be the problems encountered in the first set of negotiations and the advantages of joining the CGA. He also expressed the hope that this would make the next set of negotiations easier and more productive as a result of the expertise and service offered by the USWA under the Service Contract.

67. The CGA filed its application for certification (in Board File No. 1484-88-R) on September 19, 1988. Later that Fall, UPGWA Local 1962 presented the Zoo with its proposals for a second contract. The Zoo and the Local entered into a Memorandum of Agreement on November 18, 1988, following two or three bargaining sessions (at which Mr. Cook again served as the Local's spokesperson). Mr. Saxton, who also took part in those negotiations, was satisfied with the collective agreement which resulted from that second round of collective bargaining.

68. During his testimony in these proceedings, Mr. Saxton told the Board that he wished to be a member of the CGA with a Service Contract with the USWA because it was his belief that he and his fellow employees would be in a better position as a bargaining unit with the services offered by the USWA. He also testified that he did not want to continue to be a member of the CGA if the Service Contract was an impediment to certification because it was his feeling that, in the absence of the Service Contract, the bargaining unit would receive from the CGA much the same sort of assistance that it received from the UPGWA.

69. The other six certification applications to which these proceedings pertain were filed

with the Board between April 11, 1988 and January 26, 1989. The application in File No. 0068-88-R was filed by the CGA on April 11, 1988. It pertains to guards employed by Pinkerton's in the Regional Municipality of Ottawa-Carleton and the City of Cornwall. The CGA filed its application in File No. 0767-88-R on June 24, 1988 in respect of all employees of Pinkerton's working at the Molson Ontario Breweries Limited 640 Fleet Street location in the Municipality of Metropolitan Toronto. File No. 1149-89-R is an application filed by the CGA on August 12, 1988 in which it seeks bargaining rights for guards in the employ of National Protective Services Company Limited in the Regional Municipality of Ottawa-Carleton. In its application in File No. 1552-88-R, which was filed on September 28, 1988, the CGA seeks a certificate in respect of guards in the employ of Burns in the Regional Municipality of Ottawa-Carleton (as more precisely described in an unreported decision dated December 7, 1988, rendered by a differently constituted panel of the Board in relation to that application). In its application in File No. 2261-88-R, which was filed on December 15, 1988, the CGA seeks to be certified for guards employed by Wackenhut of Canada Limited in that same regional municipality. File No. 2666-88-R is an application filed by the USWA on January 26, 1989 in respect of guards employed by Pinkerton's in the City of Cambridge and the City of Brantford (as more precisely described in an unreported decision dated February 20, 1989, rendered by a differently constituted panel of the Board in relation to that application).

Part III

The Non-Suit Motion

70. After counsel for the applicants and the individual interveners had concluded calling evidence on section 2(d), and counsel for all of the other parties participating in the hearing had advised the Board that they would not be calling evidence on section 2(d), the Board heard submissions on March 29 and 30, 1990 regarding whether or not the Board should entertain a non-suit motion (or, alternatively, bifurcate the section 2(d) and section 1 phases of the case). In accordance with a procedural ruling made by the Board on March 29 (after hearing submissions on who should proceed first in arguing those matters), the Board heard first from counsel for the respondents and institutional interveners, and then from counsel for the applicants and individual interveners. After hearing some reply submissions, the Board recessed the hearing at the usual time on March 30. On April 3, 1990, which was the next scheduled day of hearing, the Board rendered the following unanimous oral ruling in respect of that matter:

> Having duly considered the submissions that were made before us last Thursday and Friday concerning whether or not the Board should entertain a non-suit motion at this stage of the proceedings (or, in the alternative, bifurcate the section 1 phase of the case from the determination of whether there has been any violation of section 2(d) of the Charter), we have concluded that it is unnecessary to hear any further reply submissions as we are persuaded that it is appropriate to hear a non-suit motion at this time, as requested by the respondents and the institutional interveners. Although counsel for the applicants and individual interveners seeks to characterise his clients' case as an indivisible assertion that the impugned portion of section 12 of the *Labour Relations Act* contravenes section 2(d) of the Charter and is not "saved" by section 1 thereof, it is clear that the section 2(d) and section 1 issues are analytically distinct. The applicants and the intervening employees have closed their case in chief on the issue of whether section 12 breaches section 2(d) of the Charter, and have done so armed with the knowledge that the respondents and institutional interveners might well seek to bring a non-suit motion. Thus, we are satisfied that entertaining a non-suit motion at this

point does not cause them any prejudice. Furthermore, the procedures agreed to by the parties at the pre-hearing conference and subsequently adopted by this panel are not, in our view, inconsistent with a non-suit motion being entertained at this juncture. This matter has already occupied over twenty-five days of hearing time. Although the respondents and the institutional interveners have elected not to call any evidence in respect of the section 2(d) issue, it is clear that the evidence which they and the other parties intend to call in respect of section 1 will be very extensive, and will occupy a great many more hearing days. If, after hearing the non-suit motion, we are persuaded that no contravention of section 2(d) has been established, those hearing days and their very substantial attendant costs to the parties and the Board will be saved. Moreover, the legitimate labour relations interest of expedition will be served as all of the parties will have the Board's decision on where they stand long before they otherwise would have it. Similarly, a decision dismissing the non-suit motion would also provide the parties with useful information, and would make it clear that the time and effort involved in the section 1 phase of the proceedings would indeed be necessary. It is, of course, possible that after hearing the non-suit motion the Board may find it appropriate to reserve its decision on that motion and proceed with the section 1 phase of the case. In that event, we will merely have lost a relatively small number of hearing days and have heard submissions now that would otherwise have been heard at the conclusion of the section 1 evidence. Accordingly, we will now proceed to hear the non-suit motion.

71. Since counsel were unable to agree upon the order in which submissions on the non-suit motion should be made, the Board also heard argument on that matter and then ruled as follows:

> We are not persuaded that we should depart from the normal procedure on a non-suit motion whereby the parties bringing the motion proceed first with their submissions and have a right of reply following the response of the opposing parties. Mr. Shell's request that he be given an opportunity for surreply is premature and, if granted at this point, would tend to encourage all of the parties to split their arguments, thereby prolonging the matter and in all probability making the Board's adjudicative task more difficult than it otherwise would be. However, in declining to accede to Mr. Shell's request at this time, we leave open the possibility of a renewal of that request in the event that counsel for any of the opposing parties go beyond the proper scope of reply argument. If that were to occur, it would be quite appropriate for Mr. Shell to renew his request for an opportunity to make surreply submissions.

Part IV

Submissions

72. Mr. Beresford's submissions on behalf of INCO are aptly summarized as follows in the introductory portion of the Statement of Law which he filed with the Board at the commencement of his argument on the non-suit motion:

> I) Section 2(d) of the *Charter* protects the right of individuals to freedom of association. It does not protect or create group rights of freedom of association;

II) Section 2(d) of the *Charter* offers members of an association no greater protection than they already enjoy as individuals;

III) Section 2(d) of the *Charter* does not protect the objects or the actions of the group;

IV) Section 2(d) does not protect statutory rights such as collective bargaining rights;

V) Collective bargaining legislation represents a complex balancing of various interests and should not, as a matter of policy, be altered by the Courts but left to the Legislature; and

VI) Therefore, s. 12 of the *Labour Relations Act* does not contravene the guarantee of freedom of association in section 2(d) of the *Charter*.

73. The remainder of that document includes the following statements and submissions (together with the citation of numerous authorities which have been omitted from this quotation):

THE SCOPE OF FREEDOM OF ASSOCIATION

1. "Freedom of association" applies to a wide range of groups and organizations. It is wrong to interpret section 2(d) as if it applies only to trade unions.

2. "Freedom of association" means the right of an individual to associate with others in common lawful pursuits or for certain lawful purposes and the right of an individual to do in concert with others that which he may lawfully do alone. Neither the objects nor the actions of a group are protected by freedom of association. The freedom to associate carries with it no constitutional protection of the purposes of the association, or the means of achieving those purposes.

3. In other words, freedom of association does not give the members of an association any more rights or freedoms than the members already enjoy as individuals.

4. Furthermore, freedom of association is a fundamental right or freedom which must not be confused with rights created by statute.

FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

5. Collective bargaining is the creation of statute, and not a fundamental right or freedom. At common law, the rights of union membership, collective bargaining and strike activity were unknown. Indeed, at common law these activities constitute unlawful conspiracy.

6. Collective bargaining rights are modern statutory rights.

7. Section 2(d) of the *Charter* does not protect collective bargaining rights.

8. The right to certification is part of the collective bargaining scheme created under labour relations legislation and as such is merely one of the bundle of collective bargaining rights not protected by Section 2(d) of the *Charter*.

9. More particularly still, the right to choose one's collective bargaining agent is not protected by section 2(d) of the *Charter*.

10. In reaching these conclusions, courts have drawn a careful distinction between mere membership in a trade union and/or employer organization, which is protected under section 2(d), and participation in the statutory scheme of collective bargaining, which is not so protected.

11. As noted in paragraph 4, *supra*, one of the reasons collective bargaining is not protected by the constitutional guarantee of freedom of association is that it is merely the creation of statute, and has no existence independent from the legislation which establishes a collective bargaining regime.

12. Collective bargaining laws are based upon a political and economic compromise between organized labour and employers. The delicate balance between the two forces is a legislative function into which the Courts should not intrude.

13. Furthermore, in declining to give constitutional protection to collective bargaining, courts and tribunals have indicated that collective bargaining is actually a question of freedom of contract and economic rights, rather than a freedom of association issue.

14. The *Labour Relations Act* and the other collective bargaining statutes create conditional rights to collective bargaining. There is no absolute right to collective bargaining under the statutes. The Legislature never intended that the statutory right to collective bargaining be separated from its statutory conditions. In fact, the elimination of the conditions or any one of them, would expand the rights to collective bargaining and create new rights where none exist.

15. For these reasons, it is submitted that section 12 of the *Labour Relations Act* is not inconsistent with the guarantee of freedom of association. Consequently, the Intervenor, INCO Limited, requests that the applications before the Board be dismissed.

74. In expanding upon those submissions in his oral argument, Mr. Beresford referred extensively to the Supreme Court of Canada's "trilogy" of freedom of association cases: *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161 (the "*Alberta Reference*"); *Public Service Alliance of Canada et al.* v. *The Queen in Right of Canada et al.* (1987), 38 D.L.R. (4th) 249 (the "PSAC" case); and *Government of Saskatchewan et al.* v. *Retail, Wholesale & Department Store Union, Locals 544, 496, 635, & 955 et al.* (1987), 38 D.L.R. (4th) 277 (the "*Dairy Workers*" case). He also referred to numerous other authorities, of which those that we find to be noteworthy will be mentioned later in this decision. Mr. Beresford acknowledged that in the *PSAC* case, McIntyre J. purported to leave open the question of whether some aspects of collective bargaining fall within section 2(d). However, he submitted that almost all other judgments have concluded that section 2(d) does not include collective bargaining, and further submitted that if one analyses the principles and precepts which McIntyre J. sets out in concluding that the right to strike is not protected by section 2(d), one can come to no other conclusion than that neither certification nor any other aspects of collective bargaining fall within the scope of that provision. He further submitted that certification is obtainable only by a group, and that even a group can only obtain it in the selective circumstances in which access to it has been granted by the Legislature. It was also his contention that certification has no counterpart in the context of an individual employee. In this regard he noted that an individual employee cannot compel an employer to bargain concerning terms and conditions of employment.

75. After adopting all of Mr. Beresford's submissions, Ms. Gleason, in her argument on behalf of Pinkerton's, restated a number of pertinent principles and emphasized that certification, collective bargaining, and strike rights are created by statute and are granted not to individuals but to associations which meet the criteria specified in the statute. She also contended that collective bargaining and certification are analytically identical to strikes, and that the policy considerations advanced in the trilogy apply with equal force to them. In support of her contention that the courts in subsequent cases have overwhelmingly interpreted the trilogy as placing not only the right to strike but also collective bargaining and certification rights beyond the ambit of freedom of association, she referred the Board to a number of cases, including several from the Province of Quebec.

76. In his submissions on behalf of Burns, Mr. Gordon adopted the submissions of Mr. Beresford and Ms. Gleason. He also argued that finding the impugned portion of section 12 to be in violation of section 2(d) of the Charter would be as ludicrous as finding a law precluding the use of golf carts on a golf club's environmentally protected golf course to be violative of the freedom of association of a golfer whose knee problems prevented that individual from playing on the course

without the benefit of a cart. It was Mr. Gordon's contention that in this hypothetical situation there would be no violation of freedom of association because there was no law which said that the golfer could not join the golf club; he argued that the golfer's ability to participate in the activities of the club is a different matter and has nothing to do with freedom of association. He further submitted that adopting the approach set forth in Dickson C.J.C.'s dissent in the *Alberta Reference* would make many parts of the *Labour Relations Act* susceptible to judicial scrutiny under the Charter, including section 44, which requires disputes concerning collective agreement interpretation to be resolved by arbitration; section 8, which empowers the Board to certify a union without a representation vote on the basis of employer unfair labour practices; section 40a, which provides for first contract arbitration; the totality of the construction industry provisions; and also sections 6, 13, 15, 17, 18, 39, 40, 41, 42, and 43. Mr. Gordon noted that there is no legislative provision which prohibits guards from joining the USWA or the CGA, and that there is not a scintilla of evidence that any of them have been precluded from doing so. He went on to suggest that the evidence in fact established that guards are at liberty to join the USWA or the CGA, and to participate in all of their lawful activities. He further argued that the guards' inability to have the USWA or the CGA as their bargaining agent is not a matter of freedom of association.

77. Mr. Monteith adopted on behalf of the Zoo all of the preceding submissions and emphasized that, on the basis of the authorities to which the Board had been referred, certification is a group right, purely legislative in nature and not guaranteed by the Charter.

78. Mr. Christen adopted on behalf of Wackenhut all of the preceding submissions. He also submitted that to the extent that the plurality decision of Le Dain J. in the *Alberta Reference* was not on all fours with the decision of McIntyre J., the former is even more restrictive than the latter as it does not quite get to the point that an individual is constitutionally entitled to join with others to do anything that the individual is lawfully entitled to do alone.

79. Mr. Stephenson adopted on behalf of the UPGWA all of the preceding submissions and restated a number of them. In referring to McIntyre J.'s judgment in the *PSAC* case, he submitted that certification could not possibly fall within the scope of freedom of association as it is not an individual right and thus does not fall within even the broadest of the three approaches adopted by McIntyre J. in the *Alberta Reference*. He further submitted that, although it has been appealed, the judgment of Henry J. in *Arlington Crane* (1988), 67 O.R. (2d) 225 (O.H.C.), currently represents the law in Ontario and clearly establishes that certification is not within the ambit of section 2(d). Mr. Stephenson acknowledged that section 12 imposes in the context of guards a restriction on statutory rights which other groups of employees have, but submitted that what the Charter is concerned with is restrictions on constitutional rights, not restrictions on statutory rights. Having noted that Mr. Shell had abandoned his earlier contention that the impugned portion of section 12 violated section 15 of the Charter, Mr. Stephenson submitted that Mr. Shell could not backfill that position by trying to read the section 15 equality requirements into section 2(d).

80. In summarizing Mr. Shell's submissions on behalf of the applicants and the individual interveners, we will first describe his primary submissions, in which he did not assert that certification and collective bargaining are constitutionally protected under section 2(d). We will then summarize his alternative argument, in which he did assert that at least the certification aspect of collective bargaining does fall within the ambit of that provision.

81. Mr. Shell initially submitted that the impugned portion of section 12 impacts on membership rules as it precludes a union which wants to represent guards from becoming a mixed union by admitting non-guards into membership. He further submitted that it abrogates the guards' common law right to engage in a representation strike, and denies guards the right to be represented by

a mixed union through certification, which he described as a fundamental benefit of the *Labour Relations Act*. He added that it denies guards in a mixed union all the attendant benefits under the Act, including section 15 and the opportunity to obtain conciliation and thereafter engage in a lawful strike. It was his contention that guards are in a worse position than persons not covered by the Act, and that guards who want to be represented by a mixed union are in a worse position than all other employees covered by the Act. In his brief comments concerning the voluminous evidence that had been adduced before the Board on behalf of his clients, Mr. Shell merely noted that the Board has heard evidence of who the parties are, evidence of the desire of the individual intervener Ron Saxton to change his bargaining agent from the UPGWA to the CGA, evidence as to the manner in which the Service Contract emerged, and evidence of the aspirations of CGA President Stuart Deans, on behalf of CGA members, for affiliation with and integration into a mixed union. Mr. Shell also submitted that the extent and the magnitude of the effect of section 12 is self-evident upon examination of the section. He urged the Board to apply the analytical approach set forth by the Supreme Court of Canada in *Irwin Toy Ltd.* v. *Quebec (Attorney-General)* (1988), 58 D.L.R. (4th) 577. It was his contention that doing so should lead the Board to conclude that, even under the most restrictive view of freedom of association, the impugned portion of section 12 falls within the scope of that freedom and is a purposive, intentional, and direct infringement thereof. He submitted that the purpose of section 12 is to compel dissociation between guards and non-guards by denying guards the benefit of certification if they choose to associate with non-guards by joining a mixed union or a guards' union affiliated with a mixed union. This, he suggested, amounted to a penalty or reprisal imposed on guards on the basis of the persons with whom they associate. It was also his position that this constitutes governmental regulation of the formation or establishment of an association, and that the impugned portion of section 12 is inconsistent with section 2(d) because it makes receipt of the benefit of certification conditional upon acceptance of a limit on freedom of association. In support of this branch of his argument, Mr. Shell referred the Board to *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner)* (1988), 53 D.L.R. (4th) 530 (N.W.T.C.A.); *Hills* v. *Canada (Attorney-General)* (1988), 48 D.L.R. (4th) 193 (S.C.C.); and *Black* v. *Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (S.C.C.), affirming 27 D.L.R. (4th) 527 (Alta. C.A.). It was also Mr. Shell's contention that if we disagreed with his position concerning the purpose of section 12, we should nevertheless find section 2(d) to have been contravened by virtue of the effect of the impugned portion of that provision. After referring the Board to *Regina* v. *Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 (S.C.C.), and *Edwards Books and Art* v. *The Queen* (1986), 35 D.L.R. (4th) 1 (S.C.C.), he submitted that the effect of section 12 is to encourage guards to join a nonaffiliated guards' union by granting a significant statutory advantage to such unions, and to discourage them from joining other unions, by making it significantly less attractive for guards to join together with non-guards in a mixed union, or to join a guards' union affiliated with a mixed union. Mr. Shell acknowledged that guards may still join the USWA, but submitted that section 12 places a substantial burden in the way of their doing so. He also submitted that section 12 constitutes a systemic discriminatory burden in that guards who belong to nonaffiliated guards' unions are benefited by the section, while guards belonging to mixed unions, or guards' unions affiliated with mixed unions, are burdened by it. It was his contention that legislation which permits some groups to do certain things but forbids other groups from doing the same things infringes section 2(d). During this branch of his argument, Mr. Shell suggested that Mr. Gordon's golf cart example was probably too trivial and insubstantial to constitute a breach of section 2(d), but that if it did, it would be eminently justifiable under section 1.

82. In his alternative argument, Mr. Shell submitted that the trilogy is not authority for the proposition that all aspects of collective bargaining are excluded from section 2(d). After referring to McIntyre J.'s judgments in the *Alberta Reference* and the *PSAC* case, he argued that the trilogy leaves open the question of whether some aspects of collective bargaining are constitutionally pro-

tected by section 2(d). On the basis of the "third approach" adopted by McIntyre J. in the *Alberta Reference*, he submitted that it is unlawful for legislation to prohibit groups of guards from bargaining with their employer when it is lawful for an individual guard to do so. He also referred to *Hutton* v. *Attorney-General of Ontario* (1987), 62 O.R. (2d) 676 (H.C.), in which Rosenberg J. concluded that the Public Service Act's complete prohibition against commissioned officers of the Ontario Provincial Police engaging in collective bargaining is contrary to section 2(d). Mr. Shell further argued that freedom of association protects the right of guards (and other employees) to choose, free of constraint, who is to engage in collective bargaining on their behalf. He also referred the Board to the discussion of international law regarding freedom of association contained in Dickson C.J.C.'s dissenting judgment in the *Alberta Reference*, and urged us to carefully review it together with Professor Hepple's paper entitled "The Freedom of Association of Security Guards in the International and European Labour Law" (which paper is described in paragraph 15 of our aforementioned decision dated January 31, 1990, that has been reported as *Pinkerton's of Canada Ltd.*, [1990] OLRB Rep. Jan. 68).

83. In the concluding portion of his argument, Mr. Shell reminded the Board that the Charter, as the supreme law of the land, is the inspirational expression of the fundamental values on which our society is structured. He also submitted that labour relations cannot be placed on a different level from other aspects of human activity and be thereby rendered immune from Charter review.

84. In his reply argument, Mr. Stephenson referred again to *Arlington Crane*, *supra* and submitted that there is no analogy between individual bargaining and collective bargaining. He expressed agreement with the *Irwin Toy* analysis, but strongly disputed the manner in which Mr. Shell had urged the Board to apply that analysis in the present case. He also argued that the *Black* case is distinguishable from the instant case in that it involved a prohibition of the formation of an association. It was his contention that Mr. Shell's systemic discrimination argument was, in essence, a submission that what is lawful for one group must be constitutionally lawful for all groups, and that this argument is based upon a fallacious attempt to analogise group rights to individual rights. In commenting on *Big M Drug Mart*, he noted that the substantive content of freedom of religion differs from that of freedom of association in that the former includes objects and activities while the latter does not. Mr. Stephenson also contended that Mr. Shell's benefits and burdens argument confused benefits and burdens with qualifications or access requirements in respect of statutory licensing schemes, and that this argument attempted to accomplish indirectly what could not be accomplished directly, i.e., bringing the objects of an association within the ambit of section 2(d). He also disputed Mr. Shell's interpretation of the *Hills* case. In commenting on Professor Hepple's paper, Mr. Stephenson expressed the view that although the Board is entitled to look at it, the paper is of little, if any, value in that it was prepared for purposes of being introduced as evidence in this litigation and has not been published.

85. Mr. Christen adopted Mr. Stephenson's reply argument. Most of it was also adopted by Mr. Monteith, who only differed on the matter of Professor Hepple's paper, which he submitted should be totally ignored. Having noted that in its January 30, 1990 decision the Board had found the paper to be inadmissible as evidence in respect of section 2(d), he argued that it would be prejudicial to the respondents for the Board to permit Mr. Shell to introduce it in argument.

86. Mr. Gordon adopted the preceding reply arguments and embellished upon a number of them. He disputed Mr. Shell's assertion that recognition strikes were lawful at common law. He submitted that Mr. Shell had failed to properly deal with the first step in the *Irwin Toy* case, and also contended that there was no merit in his systemic discrimination argument. Mr. Gordon reiterated that collective bargaining is a group activity that is not open to anyone on an individual

basis. Thus, he submitted that all individuals are treated alike in that regard, and further submitted that there can be no infringement of one's freedom to associate with respect to something that one cannot lawfully do on one's own. In commenting on Professor Hepple's paper, Mr. Gordon did not ask us to ignore it entirely, but did suggest that we pay little attention to it.

87. Ms. Gleason adopted Mr. Stephenson's reply submissions with the exception of those pertaining to Professor Hepple's paper, on which she adopted those of Mr. Monteith. She also adopted Mr. Gordon's submissions concerning discrimination. Her reply submissions echoed the aforementioned distinction between individual and group rights, the contention that Mr. Shell had not properly gone through the first step of defining freedom of association, and the respondents' earlier submissions concerning the trilogy.

88. Mr. Beresford's reply also echoed the preceding reply submissions, and developed upon a number of them. It was his contention that Mr. Shell's argument failed at the first step set forth in *Irwin Toy* because freedom of association does not include certification or collective bargaining, which are group rights and not individual rights. He also submitted that it would be improper to use that case's second step concept of burden in performing the first step of defining freedom of association. He further argued that acceptance of Mr. Shell's submissions would result in both an unwarranted extension of the Act beyond its intended limits and an unwarranted creation of group rights that had never existed before. Mr. Beresford noted that nothing in section 12 prevents guards from associating with others (through the USWA, the CGA, or any other organization) for purposes such as establishing goals, sharing information, gathering statistics, electing officers, sharing social and political views, providing and obtaining education and training, and exercising other individual rights in a group context. He sought to distinguish the *Northwest Territories* case, and also contended that it was wrongly decided in that if failed to differentiate between group rights and individual rights. In support of his contention that Professor Hepple's paper could not properly be taken into account in deciding this motion, Mr. Beresford noted that it was not a scholarly writing which, through publication, had been put into the public domain where it would be open to public criticism. He also submitted that it would be unfair and inappropriate for the Board to rely upon that paper which had been prepared as evidence but found to be inadmissible by the Board in respect of section 2(d).

89. Mr. Shell then requested and was granted an opportunity to make surreply submissions on a narrow point which he had not previously addressed.

PART V

Decision

90. To decide the non-suit motion, we must determine whether or not a *prima facie* case in respect of section 2(d) of the Charter has been made out. As indicated above, it is the position of the applicants and the intervening employees that the portion of section 12 which provides that "no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards" is violative of the freedom of association guaranteed by section 2(d). In *Irwin Toy Ltd.*, *supra*, the Supreme Court of Canada prescribed a two step analysis for determining such matters. Although that case involved the issue of whether the Charter's section 2(b) freedom of expression was violated by certain provisions of the (Quebec) *Consumer Protection Act* which prohibited television advertising directed at persons under thirteen years of age, it is clear from the

following passage from the majority judgment of Dickson C.J.C., Lamer and Wilson JJ. (at pages 605-6) that the same two step analysis applies to cases involving freedom of association:

> B. *The first step: was the plaintiff's activity within the sphere of conduct protected by freedom of expression?*
>
> Does advertising aimed at children fall within the scope of freedom of expression? This question must be put even before deciding whether there has been a limitation of the guarantee. Clearly, not all activity is protected by freedom of expression, and governmental action restricting this form of advertising only limits the guarantee if the activity in issue was protected in the first place. Thus, for example, in *Reference re Public Service Employee Relations Act (Alta.)* (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313, 51 Alta. L.R. (2d) 97; *P.S.A.C. v. Canada* (1987), 38 D.L.R. (4th) 249, [1987] 1 S.C.R. 424, 87 C.L.L.C. ¶14,022, and *R.W.D.S.U. v. Saskatchewan* (1987), 38 D.L.R. (4th) 277, [1987] 1 S.C.R. 460, [1987] 3 W.W.R. 673, the majority of the court found that freedom of association did not include the right to strike. The activity itself was not within the sphere protected by s. 2(d); therefore the government action in restricting it was not contrary to the Charter. The same procedure must be followed with respect to an analysis of freedom of expression; the first step to be taken in an inquiry of this kind is to discover whether the activity which the plaintiff wishes to pursue may properly be characterized as falling within "freedom of expression". If the activity is not within s. 2(b), the government action obviously cannot be challenged under that section.

If the activity in question does fall within the scope of the freedom, the analysis then proceeds to the second step, which involves a determination of the purpose and, if necessary, the effect of the impugned legislation: see *Irwin Toy Ltd.*, *supra*, at pages 608-9; see also *Big M Drug Mart*, *supra*, at page 350 where Dickson J. (as he then was), writing for the majority, observed that "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."

91. As indicated above, each of the applicants is seeking to have the Board certify it as the exclusive bargaining agent for certain guards. However, unless this Charter challenge is successful in respect of the impugned portion of section 12, that provision will preclude the Board from certifying the USWA (because it admits to membership persons other than guards), and will also preclude the Board from certifying the CGA (because it is affiliated with the USWA). Thus, in order to carry out the first step set forth in *Irwin Toy Ltd.*, the Board is called upon to determine whether the obtaining of bargaining rights through certification is included within the ambit of freedom of association under section 2(d) of the Charter.

92. Although numerous cases involving the scope of freedom of association under section 2(d) have come before various Canadian courts and tribunals, the most definitive and authoritative pronouncements to date on that subject in the context of labour relations matters are contained in the judgments rendered by members of the Supreme Court of Canada in the *Alberta Reference*, and the other two cases in the aforementioned trilogy. In the *Alberta Reference*, the Court was called upon to render an advisory opinion on the constitutional validity of various Alberta statutes which imposed compulsory arbitration as a means of resolving collective bargaining impasses regarding certain groups of employees, and prohibited the use of strikes and lock-outs in respect of them. In that case Le Dain J., with whom Beetz and La Forest JJ. concurred, wrote as follows (at pages 239-40):

> The background, the issues and the relevant authority and considerations in this appeal are fully set out in the reasons for judgment of the Chief Justice and Mr. Justice McIntyre. I agree with Mr. Justice McIntyre that the constitutional guarantee of freedom of association in s. 2(d) of the *Canadian Charter of Rights and Freedoms* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike, and accordingly I would dismiss the appeal and answer the constitutional questions in the manner proposed by him. I wish to indicate, if only briefly, the general considerations that lead me to this conclusion.

> In considering the meaning that must be given to freedom of association in s. 2(d) of the Charter it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.
>
> In considering whether it is reasonable to ascribe such a sweeping intention to the Charter I reject the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.
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> What is in issue here is not the importance of freedom of association in this sense, which is the one I ascribe to s. 2(d) of the Charter, but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought - the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer - are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the legislature by constitutionalizing in general and abstract terms rights which the legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the court becomes involved in a review of legislative policy for which it is really not fitted.

93. In a separate judgment in which he concluded that a right to strike has not been constitutionalized by section 2(d) of the Charter, McIntyre J. wrote, in part, as follows concerning the value of freedom of association (at pages 216-20):

> Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible. The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association.
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> The starting point of the process of interpretation is an inquiry into the purpose or value of the right at issue. While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and co-operation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes": L.J. MacFarlane, *The Theory and Practice of Human Rights* (New York, St Martins Press, 1985), p. 82....

> Our society supports a multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational and charitable. This exercise of freedom of association serves more than the individual interest, advances more than the individual cause; it promotes general social goals....
>
> In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is none the less a freedom belonging to the individual and not to the group formed through its exercise. While some provisions in the Constitution involve groups, such as s. 93 of the *Constitution Act, 1867* protecting denominational schools, and s. 25 of the Charter referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.
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> The recognition of this principle in the case at bar is of great significance. The only basis on which it is contended that the Charter enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association.

94. After examining six approaches which had been advanced to define freedom of association, ranging "from the very restrictive to the virtually unlimited", McIntyre J. rejected the fourth approach ("which postulates that freedom of association embraces those collective activities which have attained a fundamental status in our society because they are deeply rooted in our culture, traditions and history"), the fifth approach ("which postulates that freedom of association constitutionally protects all activities which are essential to the lawful goals of an association"), and the sixth approach ("which postulates that freedom of association constitutionally protects all activities carried out in association, subject only to reasonable limitations under s. 1 of the Charter"). In accepting the first three of the six approaches, he wrote, in part, as follows (at pages 227-9):

> Of the remaining approaches, it must surely be accepted that the concept of freedom of association includes at least the right to join with others in lawful, common pursuits and to establish and maintain organizations and associations as set out in the first approach. This is essentially the freedom of association enjoyed prior to the adoption of the Charter. It is, I believe, equally clear that, in accordance with the second approach, freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others....
>
> One enters upon more controversial ground when considering the third approach which provides that whatever action an individual can *lawfully* pursue as an individual, freedom of association ensures he can pursue with others. Conversely, individuals and organizations have no constitutional right to do in concert what is unlawful when done alone. This approach is broader than the second, since constitutional protection attaches to all group acts which can be lawfully performed by an individual, whether or not the individual has a constitutional right to perform them. It is true, of course, that in this approach the range of Charter-protected activity could be reduced by legislation, because the legislature has the power to declare what is and what is not lawful activity for the individual. The legislature, however, would not be able to attack directly the associational character of the activity, since it would be constitutionally bound to treat groups and individuals alike. A simple example illustrates this point: golf is a lawful but not constitutionally protected activity. Under the third approach, the legislature could prohibit golf entirely. However, the legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the Charter guarantee of freedom of

> association. This contrasts with the second approach, which would provide no protection against such legislation, because golf is not a constitutionally protected activity for the individual. Thus, the range of group activity protected by the third approach is greater than that of the second, but the greater range is to some extent illusory because of the power of the legislature to say what is and what is not lawful activity for the individual. This approach, in my view, is an acceptable interpretation of freedom of association under the Charter. It is clear that, unlike the fifth and sixth approaches, this definition of freedom of association does not provide greater constitutional rights for groups than for individuals; it simply ensures that they are treated alike. If the State chooses to prohibit everyone from engaging in an activity and that activity is not protected under the Constitution, freedom of association will not afford any protection to groups engaging in the activity. Freedom of association as an independent right comes into play under this formulation when the State has permitted an individual to engage in an activity and yet forbidden the group from doing so....
>
> It follows from this discussion that I interpret freedom of association in s. 2(d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.

95. After concluding that the right to strike did not fall within that definition of freedom of association because it was not lawful for an individual to cease work during the currency of a contract of employment, and because "there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation", McIntyre J. proceeded to articulate a social policy reason which also supported his conclusion (at pages 232-7):

> While I have reached a conclusion and expressed the view that the Charter upon its face cannot support an implication of a right to strike, there is as well, in my view, a sound reason grounded in social policy against any such implication. Labour law, as we have seen, is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour - a very powerful socio-economic force - on the one hand, and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate and the public at large depends for its security and welfare upon the maintenance of that balance. One group concedes certain interests in exchange for concessions from the other. There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day. Great changes - economic, social and industrial - are afoot, not only in Canada and in North America, but as well in other parts of the world. Changes in the Canadian national economy, the decline in resource-based as well as heavy industries, the changing patterns of international trade and industry, have resulted in great pressure to reassess the traditional approaches to economic and industrial questions, including questions of labour law and policy. In such countries as Sweden (Prof. Dr. Axel Adlercreutz, Sweden, in *International Encyclopaedia for Labour Law and Industrial Relations* (Kluwer Law and Taxation Publishers, The Netherlands, 1985), vol. 9, editor-in-chief Prof. Dr. R. Blanpain) and West Germany (Prof. Dr. Th. Ramm, Federal Republic of Germany, in *International Encyclopaedia for Labour Law and Industrial Relations* (Kluwer, The Netherlands, 1979), vol. 5) different directions in labour relations have been taken. It has been said that these changes have led to increased efficiency and job satisfaction. Whatever the result of such steps, however, it is obvious that the immediate direction of labour policy is unclear. It is, however, clear that labour policy can only be developed step by step with, in this country, the provinces playing their "classic federal role as laboratories for legal experimentation with our industrial relations ailments": Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto Carswell, 1980), p. 11). The fulfilment of this role in the past has resulted in the growth and development of the body of labour law which now prevails in Canada. The fluid and constantly changing conditions of modern society demand that it con-

tinue. To intervene in that dynamic process at this early stage of Charter development by implying constitutional protection for a right to strike would, in my view, give to one of the contending forces an economic weapon removed from and made immune, subject to s. 1, to legislative control which could go far towards freezing the development of labour relations and curtailing that process of evolution necessary to meet the changing circumstances of a modern society in a modern world. This, I repeat, is not to say that a right to strike does not exist at law or that it should be abolished. It merely means that at this stage of our Charter development such a right should not have constitutional status which would impair the process of future development in legislative hands. Of particular interest in this connection are the words of Peter Gall in his article, *supra*, at p. 248, where he said:

> Collective bargaining is extremely important in our society and has been for some time now. But will it always be so? Can we confidently predict that 50 or even 20 years from now collective bargaining will still be the primary activity of trade unions? Or will we have adopted some other technique for setting terms and conditions of employment, such as full-scale interest arbitration or greater reliance on legislated standards. If we cannot reject this out of hand, and I do not think we can, then we must seriously question whether collective bargaining is the kind of activity that warrants constitutional status. The Charter enshrines the fundamental principles of individual liberty. The activities of man may change over time, but these principles remain constant. Collective bargaining does not have this same timeless quality, and, accordingly, we should be leery of giving it constitutional protection under the concept of freedom of association. If the drafters had intended to enshrine collective bargaining constitutionally, it would have been a simple matter to do so explicitly. The fact that it was not done explicitly indicates that this was not intended.

To constitutionalize a particular feature of labour relations by entrenching a right to strike would have other adverse effects. Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions. If the right to strike is constitutionalized, then its application, its extent and any questions of its legality, become matters of law. This would inevitably throw the courts back into the field of labour relations and much of the value of specialized labour tribunals would be lost.

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A further problem will arise from constitutionalizing the right to strike. In every case where a strike occurs and relief is sought in the courts, the question of the application of s. 1 of the Charter may be raised to determine whether some attempt to control the right may be permitted. This has occurred in the case at bar. The s. 1 inquiry involves the reconsideration by a court of the balance struck by the legislature in the development of labour policy. The court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike. In the *PSAC* case, the court must decide whether mere postponement of collective bargaining is a reasonable limit, given the government's substantial interest in reducing inflation and the growth in government expenses. In the *Dairy Workers* case, the court is asked to decide whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike action and lockouts. None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature

> peculiarly apposite to the functions of the legislature. However, if the right to strike is found in the Charter, it will be the courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by the parties, despite the social implications of each decision. This is a legislative function into which the courts should not intrude. It has been said that the courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed in the Charter, this may on occasion be true. But where no specific right is found in the Charter and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. That is the function of the freely elected legislatures and Parliament.

96. In his dissent, Dickson C.J.C. (with whom Wilson J. concurred), after reviewing Canadian caselaw, U.S. jurisprudence, and International Law concerning freedom of association, concluded that "[u]nder our existing system of industrial relations, effective constitutional protection of the associational interest of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to section 1 of the Charter." Adopting an approach to freedom of association which has been rejected by the majority of the Supreme Court of Canada is clearly not open to the Board. Consequently, Professor Hepple's paper is not of assistance in deciding this motion as it merely expands upon the body of foreign law which served as one of the bases for the approach that found favour with Dickson C.J.C. (and Wilson J.) in the trilogy, but was rejected by all of the other members of the Court who took part in the adjudication of those cases. Accordingly, we find it unnecessary to comment on whether or not such a paper may properly be relied upon by counsel in argument.

97. As previously indicated, in his judgment in the *Alberta Reference*, Le Dain J. indicated that he agreed with McIntyre J. "that the constitutional guarantee of freedom of association in s. 2(d) of the *Canadian Charter of Rights and Freedoms* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike." A number of other judges have also interpreted McIntyre J.'s *Alberta Reference* judgment in that manner: see, for example, *Gaeetan Delisle* v. *Le Sons-Procureur General du Canada et al.*, an unreported decision of Michaud J. of the Quebec Superior Court, dated November 28, 1989; *Arlington Crane Service* v. *Ontario (Minister of Labour)* (1988), 67 O.R. (2d) 225 (O.H.C.); *Gaylor et al.* v. *Couture* (1988), 88 CLLC ¶14,041 (Que. C.A.); and *Metropolitan Stores Ltd.* v. *Manitoba Food and Commercial Workers Union Local 832 et al.* (1988), 88 CLLC ¶14,052 (Man. Q.B.). However, it appears that McIntyre J. did not intend by that judgment to entirely foreclose the possibility that some aspects of collective bargaining other than the right to strike might fall within the ambit of section 2(d). In the *PSAC* case, his judgment includes the following passage (at page 269):

> For the reasons I expressed in *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (judgment delivered concurrently), I am of the opinion that s. 2(d) of the Charter does not include a constitutional guarantee of a right to strike. My finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association.

McIntyre J.'s judgment in the *Dairy Workers* case (*supra*, at page 294) is also expressly confined to the conclusion that the Charter does not give constitutional protection to a right to strike. In both of those cases, Le Dain J. (with Beetz and La Forest JJ. concurring) reiterated that, for the reasons expressed in the *Alberta Reference*, he was of the opinion that the guarantee of freedom of association in section 2(d) of the Charter "does not include a guarantee of the right to bargain collectively and the right to strike." (Dickson C.J.C. dissented in part in *PSAC*, and wrote a differing judgment which concurred in the result in the *Dairy Workers* case. Wilson J. wrote dissenting judgments in both cases.)

98. Certification is a statutory creation (see *Gaylor* v. *Couture*, *supra*). It has no common

law counterpart. It is not available to an individual employee, but only to a "trade union", which is defined in section 1(1)(p) of the Act as "an *organization of employees* formed for purposes that include the regulation of relations between employees and employers..." (emphasis added). Moreover, section 6(1) of the Act, which gives the Board a broad discretion to determine, in the context of a certification application, the unit of employees that is appropriate for collective bargaining, expressly provides that "in every case the unit shall consist of more than one employee". The involvement of more than one employee is also implicit, if not explicit, in the term "collective bargaining", of which certification is generally the first step (unless an employer voluntarily recognizes a trade union as the employees' exclusive bargaining agent).

99. The Act specifies a number of requirements which must be fulfilled before a trade union may be certified by the Board. With the exception of situations in which an employer or employers' organization has contravened the Act so that the true wishes of the employees are not likely to be ascertained (where certification may be available under section 8 even though the trade union is unable to establish majority support), a trade union must generally either satisfy the Board that, as of the pertinent time, more than fifty-five per cent of the employees in the bargaining unit (determined by the Board to be appropriate for collective bargaining) were members of the trade union, or must win a representation vote after filing sufficient membership evidence to entitle it to obtain such a vote. By virtue of section 13, a trade union cannot be certified if an employer or employers' organization has participated in its formation or administration or has contributed financial or other support to it, nor can it be certified if it discriminates against any person because of any ground prohibited by the *Human Rights Code* or the Charter. If the application pertains to professional employees (as defined in section 1(1)(n)) or dependent contractors (as defined in section 1(1)(h)), the bargaining unit must consist solely of such persons unless the Board is satisfied that a majority of them wish to be included in a bargaining unit with other employees (section 6(4) and (5)). If the application pertains to the construction industry, a number of other constraints may also be applicable: see sections 117-151 of the Act.

100. As indicated by the Quebec Labour Court in *Association des Employes de Pyradia Inc.* c. *Pyradia Inc. et autres*, [1988] T.T. 32, the steps taken to obtain certification are not part of the process of forming an association or trade union. Applying for and obtaining certification is an action taken by such an organization after it has been formed. Moreover, neither certification nor the collective bargaining process of which it is generally the first step has any true analogue in the context of the legal relationship between an individual employee and his or her employer. While in the absence of any collective bargaining obligations, an employer and a prospective or existing employee are at liberty to bargain concerning the terms and conditions under which the latter will work for the former, such an employer has no legal obligation to do so, much less to do so in good faith and to make every reasonable effort to achieve agreement. By way of contrast, after a trade union has been certified by the Board and has given the employer written notice to bargain with a view to making a collective agreement (pursuant to section 14 of the Act), section 15 requires the employer and the trade union to meet within fifteen days of the giving of the notice (or within such further period as the parties agree upon) and to bargain in good faith and make every reasonable effort to make a collective agreement. The Act also provides for a conciliation process, the exhaustion of which is a condition precedent to a lawful strike or lock-out (see sections 16-34, 72, and 74-76). Thus, just as there is no analogy between "the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation" (see the *Alberta Reference*, *supra*, at pages 229-231), there is also no analogy between certification and the situation which obtains in respect of an employer and an individual prospective or existing employee; certification and the collective bargaining process of which it is generally the first step are not just quantitatively but also qualitatively different from the individual employment situation. Accordingly, although we agree with Mr. Shell that the trilogy is not authority for the proposition that all aspects of collective

bargaining are necessarily excluded from the ambit of s.2(d), we find no merit in his submission that the certification aspect of collective bargaining is constitutionally protected by that provision on the basis of the "third approach" adopted by McIntyre J. in the *Alberta Reference*.

101. As indicated above, Mr. Shell also relied upon *Hutton* v. *Attorney-General of Ontario*, *supra*, in support of his contention that some aspects of collective bargaining are protected by section 2(d). In that case two members of the Ontario Provincial Police Association and two members of the Ontario Provincial Police Commissioned Officers Association sought a declaration that the provisions of the *Public Service Act* which excluded senior O.P.P. officers from collective bargaining and limited the scope of collective bargaining for junior officers violated sections 2(d) and 15 of the Charter. In the portion of his judgment pertaining to section 2(d), Rosenberg J. wrote as follows (at pages 691-692):

> In the trilogy of labour cases referred to the Supreme Court of Canada they considered a number of labour relations matters: *Public Service Alliance of Canada v. The Queen* (1987), 38 D.L.R. (4th) 249, [1987] 1 S.C.R. 424, 87 C.L.L.C. ¶14,022 (P.S.A.C.); *Reference re Public Service Employee Relations Act, etc., supra*, and *Government of Saskatchewan v. Retail, Wholesale & Department Store Union, Locals 544, 496, 635 & 955* (1987), 38 D.L.R. (4th) 277, [1987] 1 S.C.R. 460, [1987] 3 W.W.R. 673. In *Reference re Public Service Employee Relations Act, etc*, there were seven questions referred to the Supreme Court of Canada, six of which the court answered. The majority found that the right to strike was not guaranteed by s. 2(d) of the Charter, and although it was not necessary in order to answer the questions, Justices Beetz, Le Dain and La Forest held that the right to collective bargain was not protected by s. 2(d) of the Charter. The position of Justice McIntyre is not as clear. However, in the *P.S.A.C.* case, which judgment was given at the same time and which judgment referred to the other two judgments, Justice McIntyre said at pp. 264-70 D.L.R., p. 453 S.C.R.:
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> > The Chief Justice bases his reasons on the first issue - that of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* - upon the proposition that freedom of association in the context of labour relations includes freedom to engage in collective bargaining and the right to strike. For the reasons I expressed in *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (judgment delivered concurrently ([see *ante*, p. 161]), I am of the opinion that s. 2(d) of the Charter does not include a constitutional guarantee of a right to strike. My finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association.
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> > In my opinion, the *Public Sector Compensation Restraint Act*, 1980-81-82-83 (Can.), c. 122, does not interfere with collective bargaining so as to infringe the Charter guarantee of freedom of association. The Act does not restrict the role of the trade union as the exclusive agent of the employees. It requires the employer to continue to bargain and deal with the unionized employees through the union. It also permits continued negotiations between the parties with respect to changes in the terms and conditions of employment which do not involve compensation. The effect of the Act is simply to deny the use of the economic weapons of strikes and lock-outs for a two-year period. This may limit the bargaining power of the trade union, but it does not, in my view, violate freedom of association.
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> Accordingly, the Supreme Court of Canada appeared to be evenly divided on the question of whether or not collective bargaining received any protection under s. 2(d) of the Charter. Since they are so divided and since in any event their reasons are obiter, I prefer the approach of McIntyre J. and would hold that the complete prohibition against collective bargaining of the commissioned officers is contrary to s. 2(d) of the Charter and for the reasons previously stated is not justified by s. 1 of the Charter.
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> On the other hand, the limited restrictions on collective bargaining for the junior officers do not, in my view, offend s. 2(d) of the Charter.

102. In our view, *Hutton* does not assist Mr. Shell's case as the section 2(d) breach which was found to have occurred in that case pertained to a complete prohibition against collective bargaining. In the instant case, guards are by no means completely excluded from collective bargaining. The Act permits them to engage in collective bargaining through a certified trade union, so long as the union does not admit to membership persons other than guards, and is not chartered by or affiliated with an organization which does so. (It also permits them to engage in collective bargaining through a mixed union or a guards' union chartered by or affiliated with a mixed union if their employer is prepared to do so on a voluntary basis.) Both the evidence in the instant case and the Board's experience in this industry indicate that a number of certificates have been issued by the Board in respect of security guards. Furthermore, it is somewhat unclear to us how Rosenberg J.'s preference for "the approach of McIntyre J." led him to the conclusion that "the complete prohibition against collective bargaining of the commissioned officers is contrary to s. 2(d) of the Charter" and that "the limited restrictions on collective bargaining for the junior officers do not ... offend section 2(d) of the Charter". It is also open to question whether all of Le Dain J.'s comments with respect to collective bargaining in the trilogy were indeed obiter. In a paper entitled "Freedom of Association and Collective Bargaining" that was presented by Paul J.J. Cavalluzzo on February 4, 1988 at the 1988 Canadian Bar Association (Ontario) Institute of Continuing Legal Education (and included in the materials filed with the Board by counsel for the respondents and the institutional interveners in support of their non-suit motion), Mr. Cavalluzzo wrote, in part, as follows (at pages 22-23) in commenting on that portion of Rosenberg J.'s judgment in *Hutton*:

> As we saw above, the Supreme Court did not render a definitive answer in the trilogy. This lack of certainty is evident in Rosenberg, J.'s judgment. First, he found that Le Dain, J.'s ruling that the right to bargain collectively was not protected by s.2(d) was obiter in that "it was not necessary in order to answer the questions". With respect, in the *Public Service Alliance of Canada* case LeDain J.'s ruling in respect of the right to bargain collectively was crucial. The union attacked not only the deprivation of the right to strike by the wage restraint legislation but also its restriction on the right to bargain collectively during the life of the programme. Indeed, the prohibition of bargaining over non-compensation matters was what the Chief Justice found to be unconstitutional.
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> Secondly, Rosenberg, J. relied upon the cryptic statement of McIntyre, J. in the *P.S.A.C.* case referred to above for authority that "the Supreme Court of Canada appeared to be evenly divided on the question of whether or not collective bargaining received any protection under s.2(d) of the Charter". Accordingly, he stated that he adopted the approach of McIntyre, J. and held that the complete prohibition against collective bargaining by the senior officers contravened s.2(d) but the restrictions on bargaining for the junior officers did not offend s.2(d) of the Charter. As stated above, upon analysis it would appear that the application of McIntyre, J.'s interpretation of s.2(d) does not render any protection for the right to bargain collectively. The right is not protected elsewhere in the Charter nor is there qualitatively analagous activity in individual terms.

103. Earlier in that paper, Mr. Cavalluzzo, in commenting on the *PSAC* case, made the following observations with which we also respectfully agree:

> In 1982, the federal government introduced its "six and five" programme. The Public Sector Compensation Restraint Act limited the amount of compensation increases in the federal public sector for a fixed period of time. At the same time it extended the terms and conditions of any collective agreement for a fixed period beyond the expiry of the collective agreement. The legislation affected the scope of bargaining and suspended the right to strike. Similarly, it removed the right to arbitrate compensation matters during the period of the Act's coverage. Among other claims, the Public Service Alliance of Canada alleged that the Act was invalid as a violation of s.2(d) of the Charter in an application for a declaration.
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> In the judgments, the Supreme Court justices relied heavily upon their reasoning in the *Alberta Labour Reference*. Justice Le Dain (Beetz and La Forest, J.J. concurring) reiterated that in his

opinion the guarantee of freedom of association in s.2(d) of the Charter does not include a guarantee of the right to bargain collectively and the right to strike. Therefore, the legislation did not contravene section 2(d).

Justice McIntyre also reiterated his previous opinion that s.2(d) of the Charter does not include a constitutional guarantee of a right to strike. However, he proceeded to make the following cryptic statement:

> "My finding in that case [*Alberta Labour Reference*] does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association."

I say this statement is cryptic because all of the institutional concerns expressed by McIntyre, J. in the *Alberta Labour Reference* relate to collective bargaining laws generally and not to the right to strike in particular. Moreover, the right to bargain collectively would not appear to be encompassed by Justice McIntyre's prior definition of freedom of association in that collective bargaining is not independently protected elsewhere in the Charter and it has no counterpart activity in individual terms. Individual bargaining with an employer is qualitatively different in that there is no statutory obligation on the employer to bargain in good faith as there is with collective bargaining. Using Justice McIntyre's prior analysis, it is difficult to conceive how s.2(d) could protect any aspect of collective bargaining.

104. For the foregoing reasons, we find no merit in Mr. Shell's alternative argument that certification is constitutionally protected by section 2(d) under McIntyre J.'s reasoning in the trilogy. We have dealt with that argument before dealing with Mr. Shell's initial submissions because we are of the view that much of the same reasoning is applicable to those initial submissions. Although Mr. Shell urged the Board to apply the analytical approach set forth by the Supreme Court of Canada in *Irwin Toy*, his submissions tended to gloss over the first step in that analysis and to place far greater emphasis on the second step. However, as submitted by opposing counsel, the second step of the analysis (which, as indicated above, involves a determination of the purpose and, if necessary, the effect of the impugned legislation) cannot legitimately be used to perform the first step of defining freedom of association. As previously indicated, certification is a statutory creation which is available only to an organization of employees, and not to an individual employee. Since it is clear from the trilogy that group rights which have no individual counterpart (or no express constitutional protection on a group basis) do not come within the ambit of section 2(d), we are driven to the inescapable conclusion that none of the applicants nor the individual interveners has a constitutional right under section 2(d) to certification free of the constraints imposed by section 12 of the Act. (See also *Arlington Crane*, *supra*, at page 262.)

105. In reaching that conclusion, we have also taken into account the fact that the social policy reasons articulated by McIntyre J. and by Le Dain J. in the *Alberta Reference* in the context of the right to strike, apply with equal force to certification rights. To paraphrase Le Dain J., the right to certification is a creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It would be undesirable and inappropriate in the labour relations law context, in which the Supreme Court of Canada has affirmed a principle of judicial restraint in the review of administrative action, for the courts to substitute their judgment for that of the legislature by constitutionalizing certification rights which the legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. (In addition to the sections of the *Labour Relations Act* mentioned earlier in this decision, see also the provisions of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74; the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, as am.; the *Fire Departments Act*, R.S.O. 1980, c. 164; the *Police Act*, R.S.O. 1980, c. 381, as am.; the *Public Service Act*, R.S.O. 1980, c. 418, as am.; and the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464.) The resulting necessity of applying section 1 of the Charter

to a review of particular legislation in this field, such as the impugned portions of section 12 of the Act, demonstrates in our respectful opinion the extent to which the courts would become involved, under that approach, in a review of legislative policy for which they are really not fitted.

106. McIntyre J.'s more extensive comments concerning the "sound reason grounded in social policy" against implying a constitutionally protected right to strike are also apposite in respect of the inappropriateness of implying a constitutionally protected right to certification divorced from the constraints and conditions imposed by the various provisions of the legislation (such as section 12), which form part of the delicate balancing of interests by the legislature in this inherently dynamic and unstable area, in which (as noted by McIntyre J.) the law continues to grow and develop in order to meet the fluid and constantly changing conditions of modern society.

107. As noted above, Mr. Shell also contended that the impugned portion of section 12 abrogates the guards' common law right to engage in a representation strike. The existence of such a right was disputed by opposing counsel. However, it is unnecessary for purposes of this decision to resolve that dispute, for even if we assume (without deciding) that such a right existed, it would not be constitutionally protected by section 2(d) for the reasons expressed by Le Dain J. and by McIntyre J. in the *Alberta Reference* in respect of other strike activity.

108. Mr. Shell also referred the Board to *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner)*, *Hills* v. *Canada (Attorney-General)*, and *Black* v. *Law Society of Alberta*. The latter case is clearly distinguishable from the instant case as the impugned rules attacked the very formation of an association (or partnership or other arrangement for the practice of law): see the judgment of Stevenson J.A. (with whom Liberman J.A. concurred), at page 582, and the judgment of Kerans J.A., at page 543. The *Hills* case turned upon an issue of statutory interpretation. In deciding that the word "financing" in section 44(2)(a) of the *Unemployment Insurance Act* should be "read as requiring active and voluntary involvement by the claimant and as implying a meaningful connection between the payment and the dispute", L'Heureux-Dube J., who wrote the majority judgment, concluded that this "narrow interpretation" was dictated by "the purpose of the section (to disentitle strikers from benefits) as well as the purpose of the Act as a whole (to provide benefits to involuntarily unemployed persons)". The majority decision also indicated that this interpretation avoided a legislative favouring of one form of labour organization over another. However, we do not read that decision as authority for the proposition that any such legislative favouring would necessarily constitute a breach of section 2(d) of the Charter, nor do we view the denial to mixed unions (and to guards' unions chartered by or affiliated with mixed unions) of access to certification in respect of guards as being the legal equivalent of the denial of unemployment insurance benefits to individual claimants.

109. The *Northwest Territories* case requires close attention because, of all the cases cited in argument, it is the one that appears to be most supportive of the primary position advocated by Mr. Shell. In that case, the Professional Institute of the Public Service of Canada (the "Institute"), was the certified bargaining agent for a group of employees employed by the Federal Government before their transfer to the employ of the Territorial Government. Having lost those bargaining rights by virtue of the transfer, the Institute wished to be in a position to regain them. However, the (Northwest Territories) *Public Service Act* which allowed an "employees' association" to require the Commissioner of the Northwest Territories (the "Commissioner") to bargain collectively, defined "employees association" (in section 42(1)(b)) as "an association of public service employees incorporated by an Ordinance empowering it to bargain collectively." An application by the Institute for a declaration that this provision was of no force and effect because it violated section 2(d) of the Charter was successful at trial. In allowing the Commissioner's appeal from that

decision, Kerans J.A. (who delivered the judgment of the Northwest Territories Court of Appeal) wrote, in part, as follows:

> The institute would characterize both incorporation *and* certification as organizational activity preliminary to the concerted activity of collective bargaining and thus within the scope of guaranteed freedom of association.
>
> I will first deal with the argument about certification. The complaint that s. 42(1)(b) interferes with the right to bargain collectively derives, the institute says, from the "... preference that it gave one association over another ..." so that the transferred nurses, for example, would be "... forced to forego their association with the Institute ...". It was said that, by this law, "an employee had no right ... to create or belong to a different union that was not established by his employer".
>
> These complaints overstate the case. The Act does not require that anybody quit a union, nor does it forbid anybody from forming or joining a union. The most that can be said is that it does not provide for a scheme for the certification and decertification of unions. Does that affect freedom of association? The institute asserts that each employee's freedom of association includes the freedom, with others, to form a bargaining agent. Even assuming that to be so, for the sake of argument, it would be wrong to say that the public servants of the Territories have by this legislation been denied that freedom. On the contrary, they are assured of just that by the law under review, and a bargaining agent is in place and functioning.
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> What might be denied the employees under this scheme is the right to *change* agents or establish smaller bargaining units with separate agents. Is there a constitutional right to do that? One must distinguish between the formation of a bargaining organization and the actual bargaining process. The Charter nowhere provides that one citizen can oblige any other citizen, or his government, to bargain with him about anything. (In this regard, I have read the decision of deWeerdt J. in *Miller v. Com'r of Northwest Territories*, unreported, published April 18, 1988 [since reported 51 D.L.R. (4th) 292, [1988] N.W.T.R. 246]). The most that could be said is that, if a government puts in place a scheme that provides for obligatory collective bargaining, then maybe employees must be left free to exercise that right in whatever grouping they choose. The difficulty with even that argument is that the law under review does not oblige an employer to bargain with just any group of employees. As with similar schemes, bargaining agents, as a condition of the exercise of the right to force an employer to bargain, must be certified. The certification process generally is, as it is here, a form of licensing.
>
> The claim of the institute, then, comes to this: freedom of association includes the freedom to get a licence to do something. The institute qualifies that by saying that it claims only a right to a fair licensing process.
>
> The leading case on the scope of s. 2(d) is, of course *Reference re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313, 78 A.R. 1 *sub nom. Reference re Compulsory Arbitration*. The Supreme Court of Canada there overruled the Alberta Court of Appeal, which had said that the distinction between organizational and other activity is fragile and not a satisfactory way to delineate the right. I was a member of the overruled court, but must apply the settled rule. Chief Justice Dickson, Wilson J. concurring, agreed with the Alberta view. Four judges (it was a six judge court) did not. Le Dain J., at p. 239, expressed the issue as whether
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> "... particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy". He decided, three others concurring, that unless the goal pursued itself involved fundamental rights or freedoms, it was not protected indirectly by freedom of association. He concluded [at p. 240],
>
> > The rights for which constitutional protection is sought - the modern rights to bargain collectively and to strike ... - are not fundamental rights or freedoms. They are the creation of legislation...

It seems to me that it must follow that the right to certification is another example of particular activity in pursuit of the goal of collective bargaining that is a mere creation of statute.

The seeking of a licence is not an organizational activity; rather, it is common pursuit of a goal. It is said for the institute that the freedom protects preparatory activity. This is correct if preparation is understood in an organizational sense; it seems not to be correct if the "preparation" is activity in pursuit of a goal that is a first step to yet another goal.

It was emphasized that the reasons of Le Dain J. did not quite attract majority support. McIntyre J. came to the same conclusion, but offered his own reasons. He canvassed six possible meanings for protected freedom of association. The fifth and sixth would apply to the pursuit of certification, but he rejected them. The fourth was that offered by the Alberta Court of Appeal; protection of activity in pursuit of goals relating to "fundamental" human activities. He also rejected it. He seems to have embraced the third and second, which protect activity by groups that for individuals is respectively permitted by law or protected by the Charter, and thus also the first, which protects mere organizational activity. He then held that the right to strike is essentially a group activity and not the group exercise of an individual legal or constitutional right, and certainly not a matter only of organization, and so not protected by the Charter. The concurring reasons of Le Dain J., as I read them, step back from outright approval of the second and third approaches, and perhaps also from an outright rejection of the fourth on the ground that a strike is not a "fundamental" human activity.

I do not see any comfort to the institute in this analysis. Approaches two and three of McIntyre J. are no help to them: certification is not available to individuals under s.42(1)(b), nor is it guaranteed to individuals by the Charter. Nor, according to Le Dain J., can the collective bargaining process be called a fundamental human activity. In the result, certification is protected only if it can be called an organizational activity. For the reasons given, I cannot do that. The argument, in the name of freedom of association, for a constitutional guarantee of a certification process larger than that permitted by statute must be rejected.

I now turn to the complaint about interference with organizational activity itself. The institute does not object to the requirement that a body of some sort exist as a prerequisite to certification. That is an obvious necessity if employees are to bargain collectively. Its complaint rather is that this law requires that the territorial council, and not the employees themselves, be the final arbiter of the *constitution* of that body, and decide sensitive questions like what shall be the scope of its objects, what the membership terms will be, what the rules for internal governance shall be, and, perhaps most importantly, whether it shall be a legal entity. That, the learned chambers judge said, is an interference with the freedom of association of the employees.

The issue at this point is whether legislation that confers a benefit upon a citizen must, when it sets the conditions of qualification for the benefit, respect the Charter rights of the citizens. The point is that there is no Charter right to the benefit; it is for the government to decide whether it should be granted or withheld. Aside from s. 15, is the government not at liberty to choose conditions? After all, nobody is obliged to seek the benefit, and nobody therefore is necessarily subject to the conditions. I think it is a matter of choice. Nevertheless, the answer, I think, is that s. 2 freedoms express standards of respect for the freedom and dignity of citizens that governments should respect in all circumstances. A law that makes receipt of benefit conditional upon acceptance of a limit on a s. 2 freedom not justifiable under s. 1 is inconsistent with the Charter.

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Notwithstanding, then, that the pursuit of certification is *not* itself a protected activity, if a law requires of the pursuers that they organize themselves in a certain way, then the law is meddling in organizational activity and the Charter is engaged. That is this case.

III

In the result, the adequacy or not, in s. 1 terms, of this legislative "scheme" for certification does not arise because there is no constitutional right to a fair certification process as an aspect of freedom of association. On the other hand, the requirement that the proposed bargaining agent be incorporated by the council might bear on freedom of association. Moreover, the limit

> is acknowledged to be unnecessary and capricious and the result of legislative oversight, so that it could not be sustained on invocation of s. 1. Therefore, the prospect of striking down looms unless the interpretive approach discussed at the outset can save it. I would interpret it to include the words "or recognized" after the word "incorporated". I would then allow the appeal and declare the law to be valid as interpreted.

110. If the ratio of that judgment is that, as a matter of interpretation, the words "or recognized" should be included after the word "incorporated" in the definition in question, then Keran's J.A.'s comments concerning section 2(d) of the Charter may all be obiter. However, even if his section 2(d) analysis is accepted as being authoritative, the case is clearly distinguishable from the instant case in that the definition in question, in the absence of Kerans J.A.'s interpretive addition, empowered the territorial council to be the final arbiter of the constitution of the association, and to decide such questions as the scope of its objects, what its membership terms and rules for internal government would be, and whether it would be a legal entity. Thus, that provision is significantly different from section 12 of the *Labour Relations Act*. Although the impugned portions of section 12 prevent a trade union from being certified if it admits to membership, or is chartered by or affiliated with an organization that admits to membership, persons other than guards, guards remain free to join any organizations they choose, including the USWA and the CGA, and to fully participate in all of their lawful activities, including determining the contents of their constitutions, the scope of their objects, their membership terms, and their rules for internal government. (The issue of whether such an organization is a "trade union" for purposes of the Act is a matter for determination by the Board. In making that determination, the Board is bound by the same (s.1(1)(p)) definition of "trade union" that applies to all other organizations of employees for purposes of the Act.) Moreover, to the extent that Kerans J.A.'s comments are framed so broadly as to arguably encompass circumstances such as those of the instant case which are substantially different from the facts of the case before him, we do not find them to be persuasive as we are respectfully of the view that they are inconsistent with the trilogy and with the *Irwin Toy* analysis.

111. As noted earlier in this decision, Mr. Shell also referred the Board to *Big M Drug Mart Ltd.*, *supra*, and *Edwards Books*, *supra*. Having carefully reviewed both of those Supreme Court of Canada decisions, we have concluded that they do not advance Mr. Shell's case because they pertain to freedom of religion, which has been defined by our highest court in a manner which differs significantly in content from freedom of association.

112. We also find no merit in Mr. Shell's systemic discrimination argument. Quite apart from the fact that Mr. Shell elected earlier in these proceedings not to pursue his clients' initial contention that the impugned portion of section 12 violated section 15 of the Charter, this argument cannot succeed because, as noted above, collective bargaining, of which certification is generally the first step, is not open to anyone on an individual basis. No employee - whether a guard or a non-guard - can individually apply for and obtain certification. Only an organization of employees can do so, and even it will only be entitled to a certificate if it meets all of the conditions and requirements specified in the Act. Thus, even if it is assumed that the impugned portion of section 12 discriminates against certain associations of employees by denying them the statutory benefit of certification which is available to other associations of employees, this does not warrant a finding that section 2(d) has been violated since, as noted above, section 2(d) protects only individual rights and not group rights which have no independent constitutional basis.

113. Having had the benefit of reading our colleague's dissent, we remain of the view that in order to carry out the first step in the *Irwin Toy* analysis, we are called upon to determine whether the obtaining of bargaining rights through certification is included within the ambit of freedom of association under section 2(d). However, if we are in error on that matter and the activity in question is more properly characterised as a guard's choosing to associate with other employees and

trade union members who are not guards by signing a membership card in the C.G.A. or the U.S.W.A., the non-suit motion would still succeed, because section 12 does not prohibit or prevent any guard from joining either or both of those unions, or any other union. Guards remain free to join whatever union they wish and to participate in all of the union's lawful activities. However, obtaining bargaining rights through certification in respect of guards is not an activity which is legally open to a union in Ontario if it admits to membership persons other than guards (or is affiliated with an organization which does so) and, for the reasons set forth above, section 2(d) of the Charter does not alter that situation.

114. For the foregoing reasons, we have concluded that a *prima facie* case has not been made out in respect of section 2(d). Accordingly, the non-suit motion succeeds and the Charter challenge in respect of the impugned portion of section 12 fails. Thus, section 12 of the Act remains in full force and effect, and precludes the Board from granting certification to the USWA or the CGA in respect of any of these applications. Consequently, these six applications are hereby dismissed.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN: June 25, 1990

1. In joining with my colleague to render the majority decision in this matter, I do so not only in the belief that the conclusion is correct at law but that the analysis and synthesis are consistent with the realities of contemporary labour relations activities which come under the ambit of the *Labour Relations Act* (the "Act") in the Province of Ontario.

2. I think it is important to note that our finding with respect to section 12 of the Act does not, and is not intended to, reflect on the efficacy or equity of labour relations systems and collective bargaining regimes in other jurisdictions domestic or foreign. Moreover, as a member of the Ontario Labour Relations Board, I recognize it is our task to interpret and administer the Act which gave rise to our existence and from which our authority derives. It follows that in exercising the discretionary powers given us by statue it is not open to us to make new law nor would it be proper, in my view, to offer a subjective evaluation of the Act over which we have purview or any of its provisions.

3. Having said that, I believe it is also fair to suggest that no one is apt to claim perfection on behalf of any statute. Nowhere is this more true than in the case of legislation dealing with labour relations, which touches so intimately on the needs and aspirations of individuals in their employment relationships. No doubt in a democratic society there must be a continual striving for improvement but, whatever legislative form that may take can only be decided by those we have elected to bear that responsibility. What follows then is merely a further reflection on some of the evidence and background against which the events described were played out and it is recited for whatever value it may have were the case to be reviewed by some higher authority.

4. As indicated in the main body of the decision, the Board admitted considerable evidence beyond that which was directly relevant to our finding. We were also invited to reflect upon comparative law and systems in several other jurisdictions. In some instances the perceived differences are great, and in not a few of them it appears that guards are represented by labour unions which would not be eligible for certification under our home law. However, this tells us nothing in a qualitative, let alone legal, sense as to the relative merit or workability of the systems being compared.

5. In my view it would be imprudent to attempt to draw comparisons in the absence of being able to view each of the systems being compared in its totality and in the light of whatever definition the courts of the jurisdiction in question have ascribed to freedom of association.

6. For example insofar as most industries are concerned Canadian tribunals and their clientele have inclined generally to the view that all interests are best served if a prospective bargaining unit (defined primarily in terms of community of interest) is represented by a single bargaining agent. Attempts to carve up or carve out representational rights are resisted in the interest of avoiding a multiplicity of bargaining relationships, a situation which many believe is contra-indicated to the goal of industrial harmony. In part the underlying rationale for this view is that one large confrontation is to be preferred over numerous smaller ones. Related to that view is the legal reality under the Act that a trade union, once certified, enjoys the right of being the sole and exclusive bargaining agent for the unit described in the certificate. This is a concept which would be found offensive to freedom of association in many of the jurisdictions to which our attention was directed.

7. An examination of other jurisdictions often suggests that if their systems avoid a multiplicity of bargaining relationships, this results from limited numbers of unions rather than statutory limitations as to which or how many unions may defend the interests of workers in a given undertaking or bargaining unit. In such jurisdictions the concept of union certification may not even exist in the terms we know. Instead unions may derive their authority from having established that they enjoy the support of the predominance of workers in a sector, industry or even geographic area and are thus entitled to "recognition" by the competent authority. Collective bargaining in some societies takes place in two or more stages, beginning at a geographic or industrial level and moving down to the level of the individual workplace where only local issues remain to be resolved.

8. Persons looking to us from the frame of reference of those societies might understandably wonder why our system could not accommodate a concept such as joint certification which might permit co-workers in a given workplace to choose between two or more unions to represent them, thus arguably giving fuller meaning to the concept of freedom of association.

9. Having in mind that freedom of association is an individual right, the foreign observer might go on to wonder if such a freedom, to have true meaning, must not be accompanied by an equal and concurrent right to refrain from associating, or to dissociate, with the same assurance of employment protection as is guaranteed those who choose to exercise the right to associate. Such an observer might well speculate as to the outcome of the challenge to section 41(1) of the Act by two or more individuals appearing in the form of a trade union contesting the proposition that the granting of exclusive bargaining rights to an individual union offends the freedom of association under the Charter.

10. Whether changes of the foregoing nature would serve to improve the system of labour relations and collective bargaining in Ontario is speculative. Their significance, for the present purpose, is that while they are illustrative of the fact that widely differing systems do exist, their mere existence tell us nothing as to the constitutionality of our own law and its provisions.

11. The collective bargaining system which evolves from the Act bears at least one striking similarity to those of other jurisdictions. Reduced to the simplest terms, and proceeding from an assumption of conflicting and competing interests between labour and employers of labour, the laws governing these systems instruct the parties of interest as to how they shall align themselves for purposes of having a fight. Save for establishing some of the ground rules for the ensuing fight, and attempting to assure that fundamental individual rights will not be abridged in the process, perhaps no more can be expected in an imperfect world.

12. The majority decision finds that the impugned section of the Act, whether or not it reflects the imperfections of this world, does not offend any individual guard's right to freedom of association, and that in the case of a trade union no such right exists to be offended.

DECISION OF BOARD MEMBER HUGH PEACOCK; June 25, 1990

1. I dissent.

2. My disagreement with the majority decision begins with its treatment of the obtaining of bargaining rights through certification as the "activity" to be examined under the Charter's guarantee of freedom of association (see paragraph 91). In my opinion the activity to be considered in accordance with the *Irwin Toy* procedure is the action of guards expressing the choice to associate with other employees and trade union members who are not guards by signing a membership card in the Canadian Guards Association or the United Steelworkers of America. The section 12 denial of certification to mixed unions is the impugned governmental activity, the purpose of which is to deny or restrict formational or associational activity of guards, through the agent of their choice. Section 12 is not a neutral provision. Its purpose is not just to deny certification to certain trade unions - so called mixed unions - which is a regulatory function - but to render futile the desire of workers who are guards to associate themselves with other workers for their economic well-being and broad democratic and social goals. Moreover, we have evidence before us of the effect of the legislation on the organizational behaviour of guards. The majority is reading into the trilogy of cases on which its decision is grounded an almost total exclusion of the most elemental aspects of how a person arrives at a conclusion to join or change membership in a group where the objects that inform the choice are largely but not exclusively economic. Section 12 is violative of a liberal, democratic notion of freedom of association. The constitutional validity of the section 12 limits is more appropriately dealt with under section 1 of the Charter.

3. In Part V of its decision, the majority of the panel begins its analysis by following the *Irwin Toy* procedure. The first question to be asked is: Is the activity within the sphere of conduct protected by freedom of association? If the answer is yes, the next question would be: What was the Legislature's purpose in enacting the offending section, and if the purpose is found to be constitutional, does the effect invalidate the provision? The activity to which the instant case pertains is the obtaining of bargaining rights through certification, the majority finds. And the Board's task is to determine whether that activity is included within the ambit of freedom of association under section 2(d) of the Charter. The majority then carefully reviews the authorities found in the cases that have gone before the Supreme Court of Canada (especially the trilogy) and concludes (in paragraphs 98 and 104) that certification involves group rights, which are not covered by the guarantee of freedom of association in section 2(d). Finally, they go on to apply to certification Justice McIntyre's and Justice LeDain's social policy reasons in regard to the regulation of strikes and the balancing by the Legislature of competing interests in that subject, a task, they concur, which is better left to the Legislatures than to the Courts. To do otherwise, they suggest, would mean constitutionalizing certification and other collective bargaining rights, free of restraints such as section 12, which are interwoven into a delicate labour relations fabric constantly under tension from the tug and pull of competing interests. Because the applicants and interveners fail to show that certification rights can be encompassed by the Charter freedom, according to the majority, there is no need to move on to the second step of the *Irwin Toy* procedure: a determination of the purpose and, if necessary, the effect of the legislation challenged by the applicants and interveners. The majority also find, moreover, in paragraph 104 that the challenger's emphasis on an invalid purpose to section 12 cannot be used to perform the first step of defining freedom of association.

4. With respect, I submit that the majority has set out on the wrong foot in conducting the first step of the *Irwin Toy* enquiry into the scope of freedom of association as it applies to the certification processes of the *Ontario Labour Relations Act*. Is certification, as sought by the applicant trade unions before this Board, really the activity at issue? To my mind, certification while obviously a significant activity before this tribunal, both as to the proportion of its total case load and

its immense importance to applicant trade unions, is not in itself a "right" but a process. It is a regulatory process whereby a threshold must be crossed in the usual course before the trade union seeking to represent an appropriate bargaining unit of employees may enter into a collective bargaining relationship with their employer. Because these applications involve to some degree a matter of first instance (in that they deal with the initiation of a collective bargaining regime, rather than the later stages of a collective bargaining relationship, as was the case in most of the decisions from the appeal courts), I wish to look at the nature of the process generally and in our Act. In his comprehensive review entitled *Canadian Labour Law* (Canada Law Book Inc., 1985), at p.309, George W. Adams, a former Chair of this Board, describes certification in these words:

> The certification process is at the heart of our system of collective bargaining and has a fundamental impact on labour relations. As we noted earlier in the chapter on history, modern collective bargaining laws were enacted to eliminate recognition conflicts. While an employer might voluntarily recognize a trade union as the bargaining representative of a coherent group of employees or "bargaining unit", collective bargaining laws create a statutory procedure for the administrative determination of the appropriate bargaining unit and the authorized employee representative. There is a broad similarity across Canada in these procedures, although different emphasis may be placed on *the utilization of membership cards and representation votes as methods of determining the wishes of employees*. All of the statutes provide for a bargaining representative to be chosen by "the majority of employees in a unit appropriate for collective bargaining". Labour boards, in most instances, have been given the responsibility to determine the appropriate bargaining unit and the wishes of the employees. *The majority rule approach within described boundaries of bargaining units is obviously borrowed from political tradition.*
>
> [my emphasis]

It is obvious that what flows from the issuance of a certificate is multi-directional. It is not addressed solely to the successful trade union applicant. It conveys both immediate and broader public policy messages. Despite the terminology used in the labour relations community, there is nothing automatic about certification. It is obtained fundamentally only on the democratic premise that the trade union enjoys majority support, as evidenced by the submission of duly completed union membership application forms and receipts demonstrating payment of a fee by each applicant or through a representation vote. That is what is certified or declared: to the Legislature, the public, the employees and the employer who must then accept in law an obligation to recognize the trade union and deal with no other trade union or employee in respect of the employment relations of the workers in the unit described in the certificate. At no other point in the scheme of the Act does the role of the Board serve to assure as effectively as it does through the certification process that with each application, the institution of collective bargaining continues to be sustained by the requirement of majority support which prevails in all the great institutions of democratic society. A further public policy objective is served in that certification offers a substitute for recognition strikes (now unlawful) and is thereby a stabilizing factor in the regulation of industrial relations. Attempts to obtain voluntary recognition are rare. Thirdly, and most importantly for our purposes, is the true wishes test of the Board's inquiry into both the sufficiency and the genuineness of the employees' support for the trade union applicant. Before issuing a certificate, the Board satisfies itself as to the authenticity of the individual's decision to enter into a collectively expressed determination of the terms and conditions of the employment relationship. More than that, it should be accepted that the Board satisfies itself as to the genuineness of the associational nature of the bond that has been formed by employees for this purpose, free of employer interference or intimidation or coercion and protected from discrimination both through our Act and the *Ontario Human Rights Code*.

5. In *Irwin Toy*, the first of the challenged provisions of the *Consumer Protection Act* (Quebec) (sections 248, 249 and 252) are directed at individuals:

> ...no person may make use of commercial advertising directed at persons under thirteen years of age.

The Court asks,

> Does advertising aimed at children fall within the scope of freedom of expression?

I accept that the same analysis applies to cases involving freedom of association, but I do not agree that obtaining bargaining rights through certification is the activity in question. Even if it includes the action of the trade union in submitting an application to the Board to establish bargaining rights, certification is no more an activity to be questioned as to scope of the freedom to associate than is the above-noted section of the Quebec *Consumer Protection Act*. Certification is neither an individual nor a group activity.

In *Irwin Toy*, the activity at issue is the commercial advertising aimed at children. In the *Alberta Reference* case, strikes, the referral of listed bargaining issues to arbitration by one of the parties, and membership by police officers in a trade union, not the prohibition, are the activities.

In *Hutton*, as in question 6 of the *Alberta Reference* case, the activity in question is the associational activity sought by senior O.P.P. officers who are precluded from engaging in collective bargaining with their fellow officers.

In *PSAC*, it is the scope of bargaining which is restricted.

In *Black*, the formation of a law firm is the activity under scrutiny. In *Hills*, the activity is financial support for a strike; the U.I. Act's denial of benefit to dues paying members of a trade union is the impugned statutory limit.

To the extent that the challenged portion of section 12 modifies the Board's usual certification practices in the case of trade unions which admit to membership persons other than guards, it is the impugned government action, the other branch of access to Charter litigation. The Legislature, by directing the Board not to certify such a trade union, is the government actor. All other sections dealing with certification are subordinated to section 12; they may be applied to guards-only applicants who are not barred by the requirements of section 12.

Is the act of applying for, or the receiving of a certificate, then the activity? Is that the activity that the applicant wishes to pursue? I suggest that the activity which is encompassed by the scope of the Charter in this case before us is the would-be association of guards with other employees and trade union members who are not guards by the signing of union membership application cards in the USWA or the CGA. Each individual card signer is both an applicant for membership in the trade union and a signatory of written hearsay evidence of his or her desire to be represented by the applicant trade unions in his or her employment relationship. In the case of the files wherein the Canadian Guards Association is the applicant, the membership application forms read:

> **APPLICATION CARD**
>
> I hereby request and accept membership in the CANADIAN GUARDS ASSOCIATION, and of my own free will hereby authorize the Canadian Guards Association, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment, and to enter into contracts with my employer covering all such matters, including contracts which may require the continuance of my membership in the Canadian Guards Association as a condition of my continued employment.

In the case of File No. 2666-88-R wherein the USWA is the applicant, the membership application forms read:

> **UNITED STEELWORKERS OF AMERICA**
>
> I hereby request and accept membership in the United Steelworkers of America, and of my own free will hereby authorize the United Steelworkers of America, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, and to enter into contracts with my employer covering all such matters.

Each of the quoted statements above is a two-part declaration first of the person's subscription to the totality of the objects and purposes of the association and second his or her authorization of the association as agent for collective bargaining purposes. It is not the second of these declarations alone that is before us. Because of the operation of section 12 they are inseparable since membership in either the Guards or the Steelworkers means association by the guard-applicant with non-guard members. That is the activity before us.

6. That brings me to the second step of *Irwin Toy*. The purpose of section 12, on its face, is to deny formational or associational activity of persons employed as guards who protect the property of an employer. It is a purposive, direct infringement, a direct breach of section 2(d) of the Charter. Its purpose is not to deny certification. That is the regulatory sanction of the section. Its purpose is to prevent association whether by membership, affiliation or integration of associations of guards with associations of other employees. Section 12 aims to keep guards apart from other workers. Not just in separate bargaining units, a consideration clearly related to collective bargaining, but in all aspects of occupational and extra-workplace associations that trade unions engage in - municipal, provincial, national, international, sectoral - wherever organizations which include other kinds of workers meet. What is not taken into account by the majority decision is the organizational impact of section 12:

- section 12 impacts on membership rules of mixed unions;
- section 12 prevents a mixed union being certified to represent guards;
- section 12 regulates membership criteria of unions;
- section 12 denies to guard employees who wish to be represented by a mixed union a fundamental benefit of the OLRA, that is the establishment of collective bargaining rights by way of certification.

7. In his affidavit put in evidence before us, Mr. Watson Cook, the regional director for Canada of the intervener International Union, United Plant Guards Workers of America stated that:

> 5. Since its inception in the Province of Ontario the operations of the UPGWA have been governed by provisions of the Ontario *Labour Relations Act* (the "Act") similar to those currently embodied in Section 12 of the Act. As a result, the UPGWA does not admit to membership persons other than security guards nor is it chartered by or affiliated with any organization which admits to membership persons other than guards. In particular the UPGWA is not a member of the Ontario Federation of Labour, the Canadian Labour Congress, nor any other central labour organization.
>
> 6. In order to maintain its ability to become certified and gain the right to represent security guards, *the UPGWA has deliberately organized itself and its activities so as to ensure that it complies with the provisions of s.12 of the Act*. Because the UPGWA does not represent persons

> other than security guards, many of the persons employed at a given work location, particularly production employees, are not eligible for membership in or organization by the UPGWA. As a result, many of the bargaining units represented by the UPGWA are quite small, comprising only a fraction of the total employees located at a particular work site.
>
> [my emphasis]

Similary, it is undisputed that the CGA is a trade union that admits only security guards into its membership. Under the head, Objectives, its constitution describes the bond of association as follows:

> Section 1 - The organization of security guards generally and in particular all guards in the private and public sector of the economic structure of Canada, not prohibited by federal or provincial legislation from participating in the collective bargaining process.

8. There is also before us in evidence the testimony of Mr. Sexton and Mr. Deans. In Mr. Sexton's case, it is the evidence of an employee who is supporting what is referred to as a displacement certification application. Whatever the underlying cause, and it was properly presented to us in evidence only as background, Mr. Sexton came to the conclusion (see paragraph 66) that he needed to re-associate himself with another organization of employees - the Canadian Guards Association - to better regulate his relationship and that of his fellow employees with his employer, the Metro Zoo. His reasons, so long as they are lawful, are not as important as his conclusion: he felt he would be better served by joining another trade union. Unfortunately he chose to associate with a trade union whose affiliation via a service contract with another trade union which admits to members persons other than guards is a bar to certification of his association. Mr. Sexton testified that he did not want to continue to be a member of the CGA if the service contract was an impediment to certification as it was found to be in File No. 0068-88-R (*Pinkerton's of Canada Ltd.*, [1988] OLRB Rep. June 613) because of the operation of section 12. In Mr. Deans' case, he appeared before the Board as an officer of an association whose members he came to persuade needed to affiliate, and later integrate their association with a trade union that admits to membership persons other than guards - the USWA. Mr. Dean's active role at the institutional level should not blur the fact that he derived his experience from employment as a guard and local union member while employed by Carleton University. He also expressed the view that if this Charter challenge fails and he is left with a choice between the CGA and the Carleton University Security Officers' Association, he might as well be unrepresented because from his experience in the former and his knowledge of the people involved in the latter he does not think that either one would be able to do any good for him.

9. It is this evaluation of or reflection by an individual on his or her experience that goes to the heart of the associational or formational decision-making process, a process which surely is primary and elemental and as deserving of Charter protection as the activities listed by Justice LeDain in the *Alberta Reference* case at pages 239-240 (i.e., freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal).

10. My colleagues have rejected Mr. Shell's reliance on the discussion by Justice Kerans of organizational impact in the *Northwest Territories* case, in which he wrote, in part, as follows:

> Notwithstanding, then, that the pursuit of certification is *not* itself a protected activity, *if a law requires of the pursuers that they organize themselves in a certain way, then the law is meddling in organizational activity and the Charter is engaged*. That is this case.
>
> [my emphasis]

I am at odds, of course, with Justice Keran's view that certification is the activity in question, rather than the desire of employees to maintain their former association on transfer from federal to territorial employment. I do adopt, however, his observation that statutes which interfere with organizational activity are violative of the Charter.

11. Even if his section 2(d) analysis is accepted as being authoritative, say the majority (in paragraph 110), the case is clearly distinguishable in that the challenged words empowered the tribunal in the *Northwest Territories* case to decide the association's terms of membership, etc. The majority continues:

> Thus, that provision is significantly different from section 12 of the *Labour Relations Act*. Although the impugned portions of section 12 prevent a trade union from being certified if it admits to membership, or is chartered by or affiliated with an organization that admits to membership, persons other than guards, *guards remain free to join any organizations they choose, including the USWA and the CGA*, and to fully participate in all of their lawful activities, including determining the contents of their constitutions, the scope of their objects, their membership terms, and their rules for internal government.
>
> [my emphasis]

But to what purpose? Certainly, not the central purpose which led them to choose to join either the CGA or the USWA. If freedom of association is an individual freedom, what does Charter section 2(d) do for Ron Sexton if section 12 of the Act is indeed constitutionally valid? If his constitutional freedom of association is guaranteed, as the majority says it is, apart from section 12, why can he not both join an association which attracts his support and that of a majority of like-minded fellow employees and have it certified. Why must he join a type of association the Legislature approves of for collective bargaining purposes because he wears a guard's uniform at work? I am of the view that Justice Kerans has correctly framed the issue and the cases are not significantly different. They are both cases of legislation with a purposive impact aimed at denying associational activity.

12. Before closing I would like to make some comments on the decisions of the Supreme Court of Canada in the trilogy. In the *Alberta Reference* case the third definition adopted by Justice McIntyre results in a very narrow interpretation of the section 2(d) freedom of association. It provides that whatever action an individual can *lawfully* pursue as an individual, freedom of association ensures he can pursue with others. He recognizes that under this approach the range of Charter-protected activity could be reduced by legislation, because the legislature has the power to declare what is and what is not lawful activity for the individual. Justice McIntyre, nevertheless, goes on to reassure:

> The Legislature, however, would not be able to attack directly the associational character of the activity, since it would be constitutionally bound to treat groups and individuals alike.

With respect, I do not share that reassurance. Through enactment of emergency or special legislation, it is foreseeable that Parliament or a legislature may not only terminate a strike without fear of the Court's disapproval, (as in the "*Dairy Workers*" case) but may also terminate bargaining rights by way of decertification and perhaps direct a labour relations board not to re-certify a trade union for a particular group of employees. The Supreme Court's approach would be utterly unprotective of the associational activity of the workers affected by such legislation.

13. Much has been made by respondents' counsel of the often repeated declaration that collective bargaining rights are the creation of statute in our time and are not constitutionally protected because they are group rights. Chief Justice Dickson's comment at page 193 of his decision in the *Alberta Reference* case is a particularly telling reply to that submission:

> While it may be true that the Charter was not framed for the purpose of guaranteeing rights by legislative enactment, the view that certain rights and freedoms cannot be protected by the Charter's provisions because they are the subject of statutory regulation is premised on a fundamental misconception about the nature of judicial review under a written constitution.

Statutory rights, as found in the Ontario *Labour Relations Act*, may be necessary, inadequate, discriminatory, irrelevant, or unenforceable, etc. The question is not whether they are statutory rights and therefore beyond review or question. The question is, are they pursued within the sphere of conduct protected by the freedom? The overarching consideration, continuing with Mr. Justice Dickson's words at page 198, remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

14. During argument of this non-suit motion, one of the remarkable distinctions drawn to our attention was that between freedom of religion on the one hand and freedom of association on the other. The majority has rejected Mr. Shell's arguments based on *Big M Drug Mart Ltd.* and *Edwards Books* because freedom of religion has been defined by the Supreme Court of Canada in a manner which differs significantly from freedom of association (paragraph 111). As Mr. Stevenson put it, the content of the Charter freedom of religion includes objects and activities while the content of freedom of association does not. It has been held throughout that freedom to associate carries with it no constitutional protection of the purposes of the association, or the means of achieving those purposes. Accepting that the Supreme Court of Canada is correct in that regard, one might conclude that associational activity for religious purposes is no longer regarded as threatening to the state whereas the associational activity of workers for collective bargaining purposes is still so viewed. We were reminded that it was only recently that the common law's treatment of strikes (and other forms of combination of working people) as criminal conspiracies in restraint of trade was supplanted by modern labour relations statute law. It is interesting that Chief Justice Dickson's characterization of freedom in *Big M* (at page 354) parallels historically the law's treatment of working people's associational activity, that is, a progression from outright prohibition to the current forms of sophisticated regulatory measures:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, *coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.* Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> [my emphasis]

It is certainly clear to me that the impugned provisions of section 12 are indeed a form of coercion referred to by the Chief Justice, since they constitute an indirect form of control over the associational activity of guards which is not applied to other workers.

15. Finally, I would suggest that the comments of Justices McIntyre and LeDain regarding the social policy considerations with which they buttress their definitions of the scope of freedom of association would have been much more appropriately placed in a section 1 consideration of what reasonable limits should be applied to the freedom to associate in a free and democratic society.

Many in the trade union movement may well appreciate their reluctance to displace the legislatures as regulators of the delicate balancing of labour relations interests. I also share that view. A broader definition of the scope of freedom of association may put at risk, through judicial review, several fundamental characteristics of our system of collective bargaining such as the granting of exclusive representational rights to a bargaining agent following certification. But the degree of deferral to the legislative role, expressed so strongly by the Supreme Court Justices at the section 2(d) stage of the anlaysis rather than at the section 1 stage, leaves unprotected the most elemental aspects of associational activity when they take place within a collective bargaining context. Collective bargaining has come to be viewed even by critics of the system as a extremely important way in which workers can participate in the extension of democratic rules from our political life to our work place life. Collective bargaining, like freedom of speech or freedom of religion, is an activity which is integral to the deeper moral values of autonomy and personal self-government which underlies our whole theory and tradition of liberal democratic government (P. Weiler, *Reconcilable Differences*, Toronto: Carswell, 1980, at pages 287-288). Section 12 of our statute denies employees who are guards a full measure of that autonomy, self-government and associational activity with workers who are not guards, and violates section 2(d) of the Charter. The constitutional validity of the section falls to be determined under section 1 of the Charter. Accordingly, the Board should dismiss the non-suit motion and move on to the section 1 phase of the case.

0720-89-R; 1008-89-U Laundry & Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. 732571 Ontario Ltd. and 732570 Ontario Inc., c.o.b. in partnership as **Roytec Vinyl Co.,** Respondents v. Group of Employees, Objectors; Laundry & Linen Drivers and Industrial Workers, Union, 847, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant v. Roytec Vinyl Limited, Respondent

Certification - Membership Evidence - Practice and Procedure - Timeliness - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union -Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed

BEFORE: *Judith McCormack,* Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague.*

APPEARANCES: *Murray Gold* for the applicant/complainant; *Joseph Liberman* for the respondent; *David Zimmer* for the objectors.

DECISION OF THE BOARD; June 4, 1990

1. These matters are an application for certification and a complaint under section 89 of the *Labour Relations Act*. The application for certification was first scheduled for hearing on July 7th, 1989. On that day, the parties met with a Board officer and were able to narrow the disputes between them. An interim decision issued, making certain preliminary findings. The case was then relisted for hearing. The parties adjourned the first dates set, and when the matter came before us on October 25th, 1989, they confirmed that the following issues were outstanding:

(1) A dispute with respect to the inclusion in the bargaining unit of one employee whose name appeared on the list filed by the employer;

(2) the voluntariness of two statements of desire ("the petitions") filed by some employees in opposition to the union;

(3) a request that the applicant be certified pursuant to section 8 of the *Labour Relations Act*; and

(4) a complaint under section 89 of the *Labour Relations Act* alleging that the respondent had violated various sections of the Act.

2. The parties jointly requested that we consider the matter of the petitions first. In this regard we noted that the applicant trade union filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the bargaining unit. The Board found that the form and contents of the union's documentary evidence of membership were consistent with the requirements of section 1(1)(1) of the Act, and that this evidence, standing by itself, demonstrated that the union had a level of membership support in excess of that required by section 7(2) of the Act for certification without a representation vote. However, the petitions were also filed with the Board in a timely manner and were signed by employees indicating that they wished to oppose the certification of the applicant union. The petitions included the names of sufficient employees who had previously signed membership cards to make it advisable for the Board to inquire into the circumstances surrounding the origination, preparation and circulation of the petition. If the signatures represented a voluntary change of heart on the part of those employees, they would normally raise sufficient doubt about the continuing wishes of employees to cause the Board to exercise its discretion to order a representation vote. In the parlance of the Board and the labour relations community it serves, these are what are known as numerically "relevant" petitions.

3. In this case, the applicant had also filed reaffirmations in which certain employees who had signed both membership cards and petitions against the union subsequently reaffirmed their support for the union. If the Board was satisfied that sufficient numbers of those reaffirmations signed by those employees represented the most recent voluntary expression of their wishes, the effect would be to ameliorate the concerns about their continuing wishes raised by their signatures on the petitions, and the Board would not normally order a vote. In this case, however, even if the reaffirmations were voluntary, there were still sufficient signatures on the petitions of employees who signed membership cards which were unaffected by the reaffirmations. As a result, the petitions continued to be relevant, and the Board commenced an inquiry into their voluntariness.

4. John White testified first on behalf of the petitioners. In the course of his evidence, Mr. White told the Board that two signatures on one of the petitions should not be counted, because they had been withdrawn by the persons in question. When this was confirmed by Mr. White's counsel, we recessed and reviewed the count. Upon our return, we advised the parties that as a result of the two signatures being withdrawn, the petitions were no longer numerically relevant. Consequently, we would first inquire into the voluntariness of reaffirmations, rather than the peti-

tions. If the reaffirmations were found to be voluntary, the parties would not usually present evidence with respect to the petitions because the numbers of those employees continuing to express opposition to the union were too low to affect the normal exercise of the Board's discretion.

5. The employer and the petitioners then alleged both that the union had received employer support, and was thus not entitled to certification as a result of section 13 of *Labour Relations Act*, and that the union had discriminated against Mr. White by not giving him an opportunity to join the union, ("the first set of allegations"). The union objected to the Board hearing these allegations on the basis that they were untimely, having regard to Rule 72 of the Board's Rules of Procedure, and did not make out a *prima facie* case under Rule 71. Since it was close to the end of the day, we heard the parties' submissions in this regard and reserved our decision until the following morning. On October 26th, the employer and the petitioners made a number of other allegations with respect to defects in the membership evidence ("the second set of allegations"). We directed that those allegations be filed in writing, a standard procedure used to facilitate the Board's screening process described below. We then ruled that we would not entertain the first set of allegations, and advised the parties that reasons would follow.

6. The employer and petitioners subsequently filed the second set of allegations in writing. The union objected once again that these allegations were untimely, and that they constituted an abuse of process. Counsel also pointed out that they were vague and at the very least, requested certain specified particulars. We heard the parties' submissions and then a majority of the Board, Board Member Montague dissenting, decided that we would hear the allegations, advising the parties that our reasons would follow. However, we also ordered the employer and petitioners to file the particulars requested by the union by November 1, 1989. Those particulars included identifying the cards alleged to be defective. The particulars were to be filed with the Board, and we would then determine what material would be released to the parties in light of section 111(1), which makes certain information confidential. The Board subsequently released the particulars to the parties with certain names omitted.

7. On December 15th, the next day of hearing, we advised the parties that two communications had been received from employees. The first did not disclose any allegation. More specifically, the letter stated that the employee in question had not signed a membership card. No membership card was filed for that employee. The second letter was entirely in a language other than English and French. The parties were advised that the Board does not translate this kind of correspondence. No party took exception to this practice at that time.

8. The particulars filed by the petitioners were little different than the second set of allegations in their original form. The particulars filed by the employer referred to two specific cards. The union then argued that the Board should only pursue those allegations which complied with the Board's order with respect to particulars, that is, those identifying the defective cards. No reasons were given by the employer or the petitioners with respect to why the remainder of the particulars did not conform to the Board's order. After hearing the parties' submissions, the Board ruled that it would entertain only those allegations that were particularized in accordance with its order, and advised the parties that reasons would follow.

9. All parties agreed that they wished the Board to inquire into the second set of allegations prior to entering into the inquiry with respect to the voluntariness of the reaffirmations. In light of this, and because it appeared to be the most expeditious way to proceed, we then commenced hearing evidence with respect to the second set of allegations. At the end of that day, the petitioners requested access to one of the membership cards in question and a dollar bill signed by the card-signer for the purposes of having a handwriting analyst examine these two items before

he next hearing date. Both items had been made available during the hearing to the parties. It was not in dispute that the card-signer had signed both the card and the dollar bill. The issue raised by the evidence was whether the dollar bill, which had been given to the card-signer by the collector, was a loan or a gift. We told counsel for the petitioners to review whether he wished to pursue this request and if so, to address the request to the Board in writing in the interim before the next hearing date. No request was received from the petitioners.

10. Five days later, counsel for the employer filed a letter with the Board which included the following:

> (1) Asking for reconsideration of the Board's ruling that the Board would only pursue those allegations particularized in accordance with its order.
>
> (2) Advising the Board that the employer believed that it knew what was in the letter written in a language other than English and French received by the Board, and asking to have it translated because it might relate to an ex-foreman being involved in the union's organizing campaign.
>
> (3) Asking for access to all the membership cards before the next day of hearing so that the respondent's handwriting analyst could examine both of them and dollar bills alleged to have been submitted with the membership evidence.
>
> (4) Making two new non-pay allegations with respect to membership evidence.

The union objected to all these requests, arguing that the employer was abusing the Board's processes and that it was in contempt of the Board's previous order with respect to particulars. The Board heard the parties' submissions and reserved its decision on requests 1 and 4 above, dismissing requests 2 and 3, with reasons to follow.

11. Subsequently, the parties in this matter agreed that the application should be dismissed. Since we had already made the rulings described herein and promised reasons for them, we have provided those reasons. However, in light of the ultimate disposition of this case, we do not think it would serve any labour relations purpose for us to rule on the matters on which we had reserved. As a result, we do not propose to do so.

12. Turning to our reasons for refusing to entertain the first set of allegations, Rule 71 and 72 of the Board's Rules of Procedure provide as follows:

> 71.-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.
>
> (2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision.
>
> (3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.
>
> (4) Upon a request for review being filed, the Board may,

> (a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;
>
> (b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or
>
> (c) confirm its decision dismissing the application or complaint.
>
> ***
>
> 72.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,
>
> (a) include in the application or complaint; or
>
> (b) file a notice of intention that shall contain,
>
> a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.
>
> (2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.
>
> (3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.
>
> (4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

In addition, section 8 of the *Statutory Powers Procedure Act* includes the following provision:

> Where the good character, propriety of conduct of competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

13. The Board has said that Rule 72 has two purposes: to ensure that a party alleged to have engaged in wrongdoing has sufficient notice to meet the case against it, and to avoid prejudice and delay which may thwart the expedition which is critical in labour relations matters. In *Trigiani Contracting Limited*, [1979] OLRB Rep. Feb. 141, the Board described Rule 72 in the following terms:

> 7. That section has a twofold purpose grounded in both legal considerations and in industrial relations considerations. The legal consideration implicit in section 47 [now 72] of the Board's

> Rules of Procedure is a recognition of the rule of natural justice that anyone charged with wrongdoing should have sufficient notice of the charge against him. The labour relations consideration is a recognition that the realties of union organization are such that a delay of Board proceedings may serve to defeat the union. A union may successfully defend charges made against it only to discover, upon the late granting of a certificate, that its support among the employees has substantially eroded because, for reasons often not fully understood by rank and file employees, it has failed to get certified promptly and commence immediately to bargain on their behalf. For that reason section 47 [now 72] of the Board's Rules of Procedure seeks to strike a balance between natural justice and the avoidance of delay in certification proceedings or any other proceedings before the Board. In an application for certification both the interests of natural justice and industrial relations are best served when allegations of wrongdoing are made in sufficient time and with sufficient particularity that an applicant union is not prejudiced either by surprise or by being forced to seek adjournment and the delay of its own application. Therefore, where allegations against an applicant are not filed in a timely manner or with sufficient particularity the Board may refuse to entertain them. (*Fleck Manufacturing Limited* 62 CLLC ¶16,236; *Cable Tech Wire Company Limited* (as yet unreported) Board File No. 0297-78-R, June 21, 1978).

14. In *Fleck Manufacturing Limited* 62 CLLC ¶16,236 the Board refused to entertain allegations of wrongdoing which were known to the party raising them nine days previously, and said that it would not hear last minute allegations which with reasonable diligence could have been made earlier, except for good cause:

> It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 47 [now 72] of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

See also *Pebra Peterborough Inc.*, [1987] OLRB Rep. Mar. 421; *Collant Painting*, [1987] OLRB Rep. Mar. 367; and *The Coalition of Laid-off Workers*, [1990] OLRB Rep. Feb. 129 in this regard.

15. The importance of expedition in labour litigation was emphasized by the Board in considering Rule 72 in *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138:

> The need for expedition in labour relations matters is well recognized: *Hotel and Restaurant Employees Union v. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (C.A.); *Jordan v. York University Faculty Association* (1978) CLLC ¶14,132 (Div. Ct.); *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*, (1979) 24 O.R. (2d) 400 (Div. Ct.); and, *Journal Publishing Company of Canada Ltd. et al v. The Ottawa Newspaper Guild, Local 204 et al*, (unreported, Ontario Court of Appeal, March 31, 1977) wherein Estey, C.J.O. (as he then was) observed:
>
> > In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are are [sic] labour relations defeated and denied.
>
> Rule 72 applies to all parties to the process. In *Cable Tech Wire Company Limited*, [1978] OLRB Rep. June 496 (judicial review denied November 10, 1978, unreported) the Board refused to entertain allegations known to the employer for two weeks before notice thereof was finally given on the last business day before the Board's hearing. Counsel's excuse that he had until then been unaware that witnesses were available to prove the allegations was not considered sufficient reason for having withheld them. In *Gignac, Sutts, Nosanchuk*, [1973] OLRB Rep. Aug. 438, the Board refused to entertain union charges advanced in support of certification without a vote when the events alleged were known to the union for as much as a month

before notice was given. In *Fleck Manufacturing Limited*, 62 CLLC ¶16,236, the Board refused to entertain objectors allegations of impropriety in the union's collection of membership evidence, when the allegations were first raised at the hearing of the union's certification application although known to counsel for the objectors for nine days prior.

Thus the Board must balance the importance of ensuring that all the relevant facts of any particular matter are before it, with considerations of natural justice and the special problems delay poses in labour relations.

16. In this case, the first set of allegations were gleaned by the employer from a somewhat ambiguous letter written by Mr. White which was attached to the petitions filed with the Board in June of 1989. This letter was circulated to the parties with the text of the petitions in June, although certain names were omitted to protect confidentiality pursuant to section 111(1) of the Act. From that time until October 25, 1989, no party mentioned the letter. The previous panel listed the outstanding issues in the case without describing the letter, and this panel confirmed them with the parties. There was no objection or suggestion at that time that there were other outstanding allegations.

17. Counsel for the petitioners argued that Mr. White had raised the first set of allegations through his letter and that he was entitled to rely on the Board pursuing them after that point, without doing anything more himself. As we noted earlier, the letter is ambiguous and it is not apparent that Mr. White is making allegations of violations, as opposed to explaining how he came to file the accompanying petitions. In any event, if the letter was meant to raise allegations, these are not the kind of allegations that the Board pursues of its own accord. They do not fall into the limited category of membership allegations on which the Board will commence its own inquiry. Rather, they are the sort of charge that a party must itself pursue and establish in evidence. Although the letter refers to matters taking place in June and the parties were aware of the letter shortly thereafter, it was not until October 25th that Mr. White's letter was characterized as allegations of violations which the employer and petitioners intended to pursue. In these circumstances we could not accept that the allegations were made in a timely manner under Rule 72.

18. The employer argued that it was only after Mr. White's initial testimony that it became aware of the name of the ex-foreman in question which had been omitted in the circulated material. At that point it made its allegations, and thus, counsel argues, it made them as soon as possible. It is not apparent to us that the name of the ex-foreman would make a significant difference in terms of putting the employer on notice of Mr. White's views. Having regard to the contents of Mr. White's letter even without the name in question, in our view the employer fell short of its obligations under Rule 72 by waiting until four months had passed before raising the matter in any form.

19. We were also of the view that neither allegation made out a *prima facie* case. Mr. White's letter suggests that an ex-foreman was involved in the union's organizing campaign, which the employer and petitioners now claim amounts to employer support for the union under section 13. In our view, this simple statement by itself does not support such a claim. In the absence of any other details, we would be reluctant to presume that the involvement of someone who is described as no longer employed by the employer at the time in question amounts to employer support. This is particularly so when the context of the case and all the circumstances of the litigation tend to negate an inference of the mischief at which section 13 is directed, that is, that the employer and the union are not at arm's length or that the union is an employer-sponsored entity.

20. With respect to the allegation of discrimination, Mr. White did not suggest that he had been refused membership in the union, but only that he had not been approached, and that conse-

quently his feelings were hurt. Although the preamble to the *Labour Relations Act* encourages collective bargaining, the Board does not generally provide financial or other assistance for the organizing campaigns which bring collective bargaining into existence in a particular workplace. Rather, it relies on unions and employees themselves to provide these initiatives. An effective organizing campaign may take a wide variety of forms, depending on the employees involved, the resources and organizing style of the union and the particular circumstances of the workplace. In these circumstances, unions are allowed considerable latitude in how they conduct their campaigns, short, of course, of conduct violating the *Labour Relations Act*.

21. For the most part, a campaign will also be a clandestine effort, at least initially, because of the apprehension that an employer who gets wind of the campaign will attempt to interfere with it one way or another. As a result, organizers will typically approach those employees they consider most likely to be interested in becoming members, and avoid those whom they think will not be interested or who may advise the employer of the campaign. Nothing in the Act prohibits this style of organizing or requires a union to approach each and every employee to give him or her the opportunity to join in the weeks preceding the certification application. In these circumstances, we determined that this allegation as well did not on its face make out a case for the remedy requested.

22. For these reasons, we refused to hear the first set of allegations.

23. The second set of allegations presented different problems. The essence of these allegations was that certain named employees had countersigned other unspecified employees' names on membership cards, and that they had supplied missing dollars which had not been paid by unspecified employees when they joined the union. These allegations fall into a category of "non-pay" or "non-sign" charges with respect to defects in membership evidence that the Board has usually treated with greater latitude on the question of timeliness. Indeed, in some cases where non-pay or non-sign allegations can be characterized as allegations of fraud under section 58, the Board has entertained them even after the proceedings have been completed and a certificate issued.

24. In addition, because hearing and determining such allegations will usually reveal the identity of union members, the Board will initiate its own screening process when such allegations are filed, to protect the confidentiality of employees' wishes mandated under section 111(1) to the extent possible. The Board described this process in *Estonian Relief Committee in Canada*, [1988] OLRB Rep. Nov. 1167:

> 16. The first step in that "usual investigation" is to see whether any membership evidence has been submitted in the name of the employee who it is alleged did not sign a card or make the payment referred to on the receipt or other documentary evidence of payment accompanying the card. The concern raised by a "non-sign" or "non-pay" allegation is that the Board has been invited to act on documentary evidence which may not reflect the truth about whether the person said to be a member has actually applied for membership or paid to the union on his own behalf the amount shown. If there is no document, there is no such concern. If there is a document purporting to be evidence of membership of the subject employee, a labour relations officer will interview that employee in private. If the interview discloses any matter which is cause for concern, either standing alone or in light of the contents of the Form 9 declaration filed by the union, the Board will schedule the matter for hearing, summon those persons who may have knowledge of the matters in issue and, at the hearing, conduct its own inquiry. If a "non-pay" or "non-sign" allegation does not result in the Board's scheduling a hearing, that is either because no membership evidence was filed with respect to the employee identified in the allegation or because the results of an interview with that employee raised no cause for concern. When it follows the "usual investigation", a decision not to conduct an enquiry at hearing with respect to a "non-sign" or "non-pay" allegation reveals nothing about whether a card was or was not received with respect to the individual named in the allegation.

> 17. Having regard to subsection 111(1) of the Act, the Board is concerned that its process not reveal whether a card has or has not been signed by an employee or filed with respect to that employee unless it is persuaded that there is some genuine cause for concern which outweighs the concern addressed by subsection 111(1). The risk of unnecessarily revealing membership information is minimized by invariably responding to a "non-pay"/"non-sign" allegation by first conducting the "usual investigation" and by refusing to make the allegation the subject of a hearing unless the result of the investigation warrants one. If it were otherwise, employees could be made to testify about whether they had or had not taken steps to join a union merely because they had been named in a non-sign or non-pay allegation; pursuit by those opposed to certification of "scatter gun" allegations of "non-pay" or "non-sign" could essentially neutralize the protection afforded by subsection 111(1).

25. Although the Board has formulated this specialized approach to non-pay and non-sign allegations, we reject the employer's argument that they are so unique that Rule 72 does not apply to them at all. It cannot seriously be argued that an allegation, for example, of forging signatures on membership cards does not amount to "improper or irregular conduct" within the meaning of Rule 72, and the purposes of the rule in preventing delay, prejudice and disruption and ensuring natural justice, are as cogent with respect to these allegations as with any other. The difference is that because of the importance of membership evidence in the certification process, the Board in its discretion under Rule 72 has traditionally struck a balance in non-pay and non-sign cases in which the reliability of the membership evidence has often taken precedence over other interests.

26. In this case, we had some serious concerns about the manner in which the second set of allegations was raised. It appeared that at least one of the petitioners, who was the source of the allegations, had been in possession of the relevant information for approximately four months before they were raised. For approximately three of those months, he was represented by counsel. Again, no mention was made of these allegations when the Board reviewed the outstanding issues and they were only raised when it appeared that the petitions were not numerically relevant.

27. On the other hand, it appeared that the employer had only become aware of the information in the allegations the day before they were made, and because certain hearing days had been adjourned at the request of the parties, the allegations were made at a relatively early point in the case. As the next hearing day had been assigned some six weeks later to accommodate the parties' schedules, it appeared that it would be possible to receive the particulars, screen them and subpoena any necessary witnesses in the interim. In other words, by an accident of scheduling, any delay or disruption could be minimized at that point. In addition, the screening process would provide at least some degree of protection against vexatious allegations. Having regard to the Board's jurisprudence in this area and the specific circumstances of this case, a majority of the Board dismissed the union's objections. We did not, however, preclude the very real possibility that the Board might decide differently in other circumstances where delay and prejudice could not be minimized in this fashion.

28. Turning next to our decision not to hear those allegations which did not comply with our order, we observe firstly that our order was not a general direction to provide particulars. Rather, the union had listed precisely what information it required to enable it to meet the case against it, and we directed the employer and petitioners to provide all the information requested by a certain deadline. As noted earlier, that information included specifically identifying cards which were the subject of the allegations.

29. Counsel for the employer argued that Rule 72 did not require the cards to be identified because it only specifies the name of those persons who are engaged in the improper or irregular conduct. In this case, counsel argued, that meant the names of those alleged to have countersigned other employees' signatures and those collectors alleged to have put in dollars to make up a defici-

ency in the number of dollars. As a result, it was asserted, the particulars filed complied with Rule 72.

30. We note that the Board has commented previously that full particulars must be filed with respect to membership allegations (see, for example, *Lonco Construction Limited*, [1989] OLRB Rep. Mar. 274 and *Grant Construction*, [1989] OLRB Rep. July 766). It is not necessary for us to decide whether a card-signer who fails to pay a dollar is himself or herself engaged in irregular conduct because the language of Rule 72 is inclusive. In the first instance, a person is required to file a concise statement of the material facts, actions and omissions upon which he or she intends to rely. This is described as "including" the time, place and names of persons engaged in the conduct. In other words, this brief listing is not exhaustive of the material facts required, but rather provides some general guidance. In the case of a non-pay or a non-sign allegation, there can be no more material fact than the identification of the card which is alleged to be defective. Keeping in mind the twofold purpose of Rule 72, we observe that the union would find it very difficult to prepare to meet this kind of allegation without knowing the card involved. (We emphasize that this information is only released to the union after the screening process has indicated it is necessary to hold an inquiry.) In some cases, the only alternative would be for the union to call each and every card-signer as a witness to refute the allegation. This would make a mockery of section 111(1), and would result in precisely the kind of delay and prejudice Rule 72 was designed to prevent.

31. In addition, the Board cannot conduct its usual screening unless the card alleged to be defective is identified. This process is not a full-blown investigation, but a fast, informal procedure carried on in the absence of the parties to assist the Board in protecting the confidentiality of employee wishes, and yet ensure that allegations are scheduled for hearing in the appropriate cases. It is not suited to anything more than a brief confirmation or denial of the allegation by the card-signer. The failure to identify the cards in question thus results in the procedure being circumvented, with the attendant likelihood that employee wishes will be unnecessarily exposed. Having regard then to the language and purpose of Rule 72 in this context, the Board's practice has been to require that parties making non-sign or non-pay allegations identify the cards involved.

32. In any event, in this case we specifically directed that this information be provided. Our authority for making such a direction lies both in section 72(3) cited earlier, and in section 102(13) which provides as follows:

> The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

33. Our order was made for the same reasons we have outlined above, that is, to prevent delay and prejudice and to ensure that the other parties knew the case they must meet. By December 15, 1989, the employer and the petitioners had already received the benefit of considerable latitude from the Board with respect to these allegations, and had been given what amounted to specific directions with respect to the particulars necessary. We were not persuaded that we should entertain that part of the allegations which did not comply with our order, particularly when no reasons were advanced for that non-compliance.

34. Turning lastly to the employer's requests of December 20, 1989, we note that the only reason given for the request to translate the letter received in language other than English or French was that the employer believed it might relate to an ex-foreman being involved in the

union's campaign. Since we had already ruled that we would not hear that particular allegation, this assertion did not move us to reconsider our original decision about the letter.

35. The request to have access to the membership evidence for the purpose of having the employer's handwriting analyst review it is a little more complicated. As noted earlier, section 111(1) of the Act protects the confidentiality of certain information:

> 111.-(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

36. In *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223, the Board commented that this provision was enacted in response to *Re Ontario Labour Relations Board; Re Toronto Newspaper Guild, Local 87 and American Newspaper Guild (CIO) and Globe Printing Co.* [1953] 2 S.C.R. 18 (S.C.C.) in which the Courts overturned a Board decision preventing an employer from cross-examining the deponent of an affidavit filed confirming the membership evidence. The Board went on to emphasize the importance of secrecy with respect to membership records in ascertaining employees' wishes:

> The object of certification proceedings before the Board is to ascertain the true wishes of the bargaining unit employees with respect to trade union representation. The Board's experience has been that secrecy with respect to trade union membership is essential if the true wishes of employees are in fact to be ascertained. The lack of anonymity tends to have a significant chilling effect upon both legitimate activities of trade unions and the exercise by employees of their rights under the Act, whether or not unfair labour practices are perpetrated by unscrupulous employers (and we do not suggest that this respondent is such an employer).

37. In *Brian Chevrolet Oldsmobile Ltd.*, [1989] OLRB Rep. April 324, the Board also said that section 111 preserves the anonymity of union supporters to protect them from possible employer reprisals. In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers. And those opposing the union may be concerned that if it is ultimately certified to represent employees, their working conditions or job security may be adversely affected because of their views. As a result, section 111(1) provides a critical component in the process of union organization contemplated by the *Labour Relations Act*.

38. That process features the assessment of the level of union membership among employees as the primary method set out in the Act for certification of a bargaining agent. (See *Grand & Toy Limited*, *supra*, and *Brian Chevrolet*, *supra*). As the Board observed in *Unlimited Textures Company*, *supra*, "[i]mportant considerations underlie the Legislature's choice between membership evidence and the representation vote as the means of ascertaining majority wishes (see Weiler, P. C. *Reconcilable Differences*, (Carswell, 1980), pp 37-49 for a review of these consider-

ations)". The membership assessment is made on the basis of written membership evidence submitted in the proper form by the union (see section 73 of the Board's Rules of Procedure). There are a number of requirements attached to that evidence which are provided for both in the Act (see section 1(l)), and in the Board's jurisprudence. For example, in *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. 444 sets out the following:

> In an application for certification, the Board must be satisfied that every membership card upon which an applicant trade union relies was signed by the employee on whose behalf it has been tendered and that each employee has paid the initiation fee or dues that must accompany it on his own behalf. This is accomplished by ensuring that documentary evidence of membership shows, on its face, that the employees to whom it relates have applied for membership in the applicant, and have paid to it, on their own behalf, at least $1.00 in respect of initiation fees for monthly dues in it, and that the appropriate declaration attesting to the regularity and sufficiency of that membership evidence is filed. It is also desirable that the documents show the date on which any person to whom the application and payment was made, although this can be established using *viva voce* evidence.

39. In addition, there are a number of safeguards integrated into the processing and assessment of membership evidence by the Board. Every single membership card is painstakingly checked to insure that it complies with the Board's requirements for membership evidence. As well, the signature of each employee on each card is checked against a sample signature for that employee provided by the employer. This process is performed at least twice and sometimes more often on each application by Board clerks who are specially trained to this end. Any discrepancies noted by them are brought to the attention of the panel deciding the case. Not infrequently, the panel will utilize the Board officer screening process to further check on a so-called "doubtful" signature and, as described in the Board's jurisprudence, membership evidence is held to strict standards (see *Grand & Toy*, *supra*). While no process for assessing employee wishes or membership is absolutely foolproof, generally speaking it is fair to say that this rigorous procedure has served the labour relations community well for many years. And as the Board noted in *Grand & Toy*, *supra*, errors in this process are extremely rare.

40. In this context, we had a number of concerns with respect to the employer's request. Firstly, the only outstanding allegations involved assertions that certain employees failed to pay $1.00 on their own behalf when they became members of the union. The employer was unable to point to any cards on which it claimed employees' countersignatures had been forged. In addition, and presumably unknown to the employer, no signed dollar bills were filed with the membership evidence, so there was no question of comparing signatures on membership cards with such dollar bills. The only dollar bills submitted were two which were entered by the union as exhibits relating to non-pay, rather than non-sign allegations. In these circumstances, we were concerned that the employer's request was not likely to yield evidence which would be of any use in resolving the disputes before us.

41. Secondly, we were not convinced that the introduction of partisan experts would add any additional safeguards to the process already in place, and in particular provide any assistance in disposing of this certification application. If we permitted one party's expert to examine the membership evidence, we would be hard-pressed to refuse another party's request in the same case, or even in other cases. The result might well be that the Board's effective and expeditious processes would be supplanted by a battle of experts, with the likely result of delay and expense. There is nothing in the Act or the Board's Rules which contemplates this. Indeed, the Board's mandate to resolve labour relations disputes in an informal and expeditious manner militates against it.

42. Thirdly, and most importantly, providing access to the membership evidence by the

employer's handwriting expert flies in the face of section 111(1) and its purpose. The cloak of secrecy provided by section 111(1) would be meaningless if the Board was prepared to provide access to the membership evidence to the parties or their agents on the basis requested by the employer. No employee is likely to be encouraged by section 111(1) to freely express his or her views on unionization through the membership process if the employer or the union could subsequently ascertain those views by making this kind of request. In other words, access to the membership evidence for this purpose would seriously undermine the purpose of section 111(1), while yielding little likely benefit in terms of the stringency or effectiveness of the Board's processes.

43. Section 111(1) provides the Board with a discretion with respect to revealing records such as membership evidence. However, the Board has said that this discretion is only exercised in exceptional circumstances for compelling reasons where such disclosure would further the purposes of the Act (*Grand & Toy*, *supra*). The request before us was not such a case and as a result, we dismissed it.

1316-89-U Ontario Public Service Employees' Union and its Local 561 and Leslie Charbon, Complainants v. **Seneca College of Applied Arts and Technology,** Respondent

Colleges Collective Bargaining Act - Discharge - Practice and Procedure - Unfair Labour Practice - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed

BEFORE: *G. T. Surdykowski,* Vice-Chair, and Board Members *M. Rozenberg* and *P. V. Grasso.*

APPEARANCES: *Chris G. Paliare* and *Betty Egri* for the complainants; *G. F. Luborsky, M. Fogel* and *A. Williams* for the respondent.

DECISION OF THE BOARD; June 27, 1990

1. This is a complaint, under section 80(1) of the *Colleges Collective Bargaining Act* ("the CCBA"), that the complainant Leslie Charbon was discharged by the respondent because it was thought that he supported and would testify in the arbitration of a grievance filed by another employee. Section 80(1) of the CCBA provides that:

> 80.-(1) The Council or an employer or any person acting on behalf of the Council or an employer shall not,
>
> (a) refuse to employ or continue to employ a person;
>
> (b) threaten dismissal or otherwise threaten a person;
>
> (c) discriminate against a person in regard to employment or a term or condition of employment; or
>
> (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

> because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

2. There was no challenge to the Board's jurisdiction to deal with this matter. Nor did the respondent suggest that the arbitration of a grievance of an employee within the meaning of the CCBA was not a "proceeding" under the Act (in that regard see also *Ontario Nurses Association*, [1982] OLRB Rep. Oct. 1546).

3. We first wish to note that the complainants protested, in argument, that they might have presented their case differently had they known what the evidence of the respondent would be prior to presenting their own. In addition, in the course of the proceeding, the Board was required to rule on a number of evidentiary matters. The complainants objected to a number of questions asked by counsel for the respondent of the respondent's own witnesses. The essence of many of these objections was that there was nothing on the face of the material filed, in the opening statement by counsel for the respondent, or in the *viva voce* evidence of Charbon (the complainant's only witness) which revealed, in any timely way, that the matter with respect to which the evidence objected to related, was in issue. Whatever one may think of the merits of the situation, there is no rule which requires a respondent to a complaint like this one to file a particularized reply. Nor is there any provision in the CCBA analogous to section 89(5) of the *Labour Relations Act*. We observe that this "reverse onus" provision in the *Labour Relations Act* was inserted largely as a result of the kind of situation which gave rise to the complainant's objections in this case; that is, a complainant must present its case without knowing what the respondent's justification(s) for the action(s) complained of is. In the result, under the *Labour Relations Act*, a respondent accused of dealing with a person in a manner contrary to that legislation must satisfy the Board that it did not do so and generally must proceed first. Conversely, under the CCBA, the onus is on the complainant to prove such an allegation and it will often proceed first. This creates a situation, as it did in this case, where the complainant tries to "paint a picture" with respect to what it alleges without any real idea of how the respondent might test or seek to repaint it. Nevertheless, a respondent cannot, as a matter of fairness, be precluded from presenting its justification(s), or any evidence that is arguably relevant thereto, to the Board. The manner in which the Board exercised discretion in its evidentiary rulings reflect that rationale. Finally, we observe that the complainants willingly proceeded first. They did not suggest that the respondent should present its case first.

4. On April 7, 1988, Charbon was hired by the respondent as a part-time theatre technician in the Minkler Auditorium and Studio Theatre at the respondent's Newnham Campus. In July 1988, Charbon was the successful applicant in a competition for a full-time theatre technician position which had become available. He became a full-time employee on or about August 15, 1988.

5. Unfortunately, Charbon occupied this full-time position for only a short time. After about a month he was "bumped", pursuant to the collective agreement between the complainant trade union and the respondent, by a bargaining unit employee who had been laid off from his employment in another department. Charbon reverted to being a part-time theatre technician.

6. Subsequently, a full-time technician (Andrew Wenzel) was disciplined by the respondent. Charbon disagreed with the discipline and he provided the complainant trade union with a written statement disputing the basis for it. The complainant trade union produced and relied on this statement in the course of grievance settlement discussions with respect to the Wenzel grievances. Shortly afterwards, after a confrontation with Joe McLeod, the respondent's artistic director

for its theatre facilities at the Newnham Campus and Charbon's supervisor, Charbon's employment with the respondent was terminated.

7. The complainants argue that Charbon was a more than satisfactory employee. They point to what they assert was a change in attitude towards Charbon after it was revealed that he supported the Wenzel grievances and might testify in any arbitration proceedings with respect thereto. The complainants assert that the respondent then seized upon what it perceived to be an opportunity for retribution and discharged Charbon. The complainants submit that Charbon would still be employed by the respondent but for his support for the Wenzel grievances.

8. The respondent submits that Charbon became a less than adequate employee after he was bumped out of his full-time position September 1988 and that there was nothing sudden about his termination. The respondent argues that there was no evidence that the termination had anything to do with Charbon's support for the Wenzel grievances.

9. We have already noted that the CCBA does not contain a reverse onus provision with respect to complaints that a person has been refused employment, discharge, discriminated against, or otherwise dealt with contrary to it in relation to his/her employment. Accordingly, in this case, the complainants must satisfy the Board, on a balance of probabilities, that there was an improper motive for the respondent's treatment of Charbon. The nature of complaints like this one is such that the Board must usually draw its conclusions from inferences which can fairly be drawn from the objective evidence. If the Board is satisfied that any part of the motivation for a respondent's conduct was contrary to the CCBA, the complaint will succeed. In making its determinations in that respect, the Board will consider the objective reasonableness of the actions of the respondent which are impugned by the complaint and the existence of any unusual or "peculiar" conduct of the respondent (the Board's reasoning in, among others, *John T. Hepburn, Limited*, [1985] OLRB Rep. Jan. 75; *Manor Cleaners Ltd.*, [1982] OLRB Rep. Dec. 1848; *Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35; *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 is equally apposite to cases like this one, even though those cases dealt with complaints under the *Labour Relations Act*). This case is not about just cause. The complainants need not establish that the respondent did not have just cause for its actions. Rather, they must establish that the respondent's actions were not *bona fide* in the sense that some part of the respondent's motivation therefore was improper; namely, in breach of section 80(1) of the CCBA.

10. As a general matter, we did not find Charbon to be a credible witness. In cross-examination, he was often uncooperative or unresponsive. The high opinion he has of himself was demonstrated by the self-interest which permeated his testimony, and his willingness to criticize others and blame anyone but himself for problems in the work place. His propensity to rationalize in order to put himself in a better light was demonstrated by the distinctions he drew between, for example, discussions and arguments (others argued, he discussed), and between swearing in conversations as opposed to swearing at the person to whom he was speaking. In addition, Charbon's evidence conflicts with that of all of the other witnesses, all of whom we found to be credible, and all but one of whom are bargaining unit employees represented by the complainant trade union. Nor was there any evidence called by the complainant to corroborate Charbon's testimony. In the absence of any explanation in that respect, we are bound to infer that there was no such evidence. Accordingly, and as will become evident, we do not accept Charbon's version of events where it conflicts with that of other witnesses. In the result, Mr. Paliare's able argument was left without any basis in the evidence.

11. Charbon's ability as a theatre technician was never a concern. The respondent, and in particular Joe McLeod, considered him to be a good technician. On the evidence, however, there

was dramatic change in Charbon's attitude after he was bumped out of his full-time theatre technician position in September 1988 and Charbon quickly became a troublesome and less than adequate employee.

12. Even though he continued to work what were effectively full-time hours after his status reverted to that of a part-time technician, Charbon was demonstrably unhappy about what had happened. That he was unhappy was understandable. So was some display of his feelings in that respect. However, the manner and extent of his display is another matter.

13. Between September 1988 and June 26, 1989 when his employment was terminated, Charbon displayed an increasingly negative attitude and a general dissatisfaction with his job and the people he worked with. His relations with the administrative staff and Joe McLeod deteriorated and steadily went from bad to worse. Charbon was open in his dislike and disdain for "red tape", "bureaucracy", "nine to five", and for work in general. He exhibited this through his chronic lateness, his inattention to detail in the reports required of technicians, and his attitude toward what he knew were well established procedures (like those with respect to lateness, shifts switching between technicians, and his approach to arranging time off so he could work at the Mariposa Festival). Charbon openly and often disagreed with McLeod's management approach and often challenged and berated both McLeod and other employees in that respect. In doing so, and in inserting himself in the situations involving other technicians, he was anything but constructive.

14. Another incident also illustrates his negative attitude. Around Christmas, 1988, the respondent's then facility coordinator decided to quit. When Charbon appeared to show interest in the position, McLeod encouraged him to apply for the job. McLeod cautioned Charbon that he would have to upgrade his management and computer skills by taking courses on his own time, and that it would require a five year commitment on his part. McLeod also advised Charbon that he would have to adjust his appearance (by wearing a shirt and tie, for example) because of the public relations and sales aspects of the position. Notwithstanding those cautions, Charbon appeared to be interested in and applied for the job. When he was interviewed, however, he appeared in a dirty and dishevelled condition, he said he would not make a long term commitment to the position, he said he was not interested in taking courses to upgrade the skills required to do the job properly, and he even said that he would prefer to stay as a part-time theatre technician. Why then did he apply for the position or accept an interview? In our view, Charbon did it to show up and embarrass McLeod who was on the interviewing committee and who had been touting him for the job.

15. All of this occurred prior to mid June 1989, and the June 14, 1989 grievance meeting at which it was revealed, for the first time, that Charbon supported the Wenzel grievances. Further, the evidence does not suggest that Charbon's statement had any particular impact either at the grievance meeting or otherwise. We also observe that Charbon's written statement, which is said by the complainants to have led to sudden drastic retribution against him, was never placed in evidence before the Board. Why it wasn't was left unexplained by the complainants, which, on the evidence, had the statements in their possession, power or control.

16. We are not satisfied that McLeod's attitude towards Charbon changed suddenly after June 14, 1989. First, there is nothing other than Charbon's self-interested assertion to suggest that. Second, there is ample evidence that relations between Charbon and McLeod, and indeed between Charbon and most other of the respondent's employees at the Minkler Auditorium and Studio Theatre, were strained. The documentary evidence filed with the Board reveals that there were many problems both generally and specifically with Charbon, prior to mid-June 1989. The documentary evidence and the testimony of Devi Taneja, Marie Wenman, Susan Trauzzi, and McLeod also reveal an increasing frustration with Charbon's conduct prior to mid-June 1989. We specifi-

cally accept that chronic lateness was one of Charbon's problems, notwithstanding the lack of any specific reference thereto in the documentary evidence. We also accept that McLeod endured Charbon's behaviour as long as he did because of the demands on his time and because he desperately needed a competent technician in the months leading up to and during the busiest time of the year for the theatre facilities. The June 26, 1989 incident, to which we now turn, is another example of Charbon's insolent behaviour. This incident, which was, in our view, the proverbial "straw that broke the camel's back" also occurred just before the relatively slow period of July and August.

17. On June 26, 1989, Charbon was scheduled to work from 9:00 a.m. to 5:00 p.m.. Because there was no show scheduled for that day, he knew he was supposed to be at work at 9:00 a.m. (rather than at 8:30 a.m. had there been a show). He made no effort to either report for work as scheduled or to contact the respondent to advise that he would be unable to do so. This was consistent with what we accept had become his pattern of behaviour. Charbon says he was ill that morning as a result of working hard and getting too much sun at the Mariposa Festival. There is nothing in the evidence to corroborate his assertion. There is no medical evidence, neither of the at least two people who were with him prior to his arrival at the Minkler Auditorium that day were called to testify, and the evidence of the other witnesses is that they did not perceive him to be unwell.

18. Shortly after 9:00 a.m., McLeod learned that Charbon had not reported for work. He instructed Taneja to try to contact him. On her third attempt, Taneja was finally able to reach Charbon. He said only that he would be in later. Charbon then called back, spoke to Wenman and indicated a reluctance to come to work. When this information was relayed to him, McLeod instructed Taneja to call Charbon to come in to see him. We are satisfied that McLeod, having been given no reason why Charbon could not come in to work as scheduled, wanted to see him to discuss the matters contained in a memorandum from McLeod to Charbon dated June 22, 1989, and that he had not yet formed any intention to terminate Charbon.

19. Sometime later, Charbon arrived at the Minkler Auditorium. By chance, McLeod was passing through the foyer and encountered Charbon as the latter entered. Charbon greeted him by saying words to the effect of "how fucking long is this going to take?" Somewhat taken aback, McLeod said about five minutes. In the circumstances, this response suggests that McLeod had begun to form an intention to terminate Charbon. McLeod told Charbon to get and read the June 22, 1989 memorandum and to come to his office to discuss it. Shortly afterwards Charbon entered McLeod's office, pointed at the memo in his hand and said words to the effect of "you really believe this fucking shit don't you", and followed with an indication that he was going home. McLeod advised him that they had to deal with the problems in the memorandum. They then began to argue with respect to one of the items on the list but before anything was resolved Charbon again said he was leaving, took out his keys to the auditorium and offered them to McLeod. We are satisfied that it was then that McLeod determined that he had had enough. This is demonstrated by his statement that "Leslie, I think we have reached a parting of the ways". With that, Charbon's employment was terminated. In our view, this result, though a long time coming, was inevitable. It was not "sudden" in the sense argued by the complainants.

20. In our view, it is neither necessary nor appropriate to review or comment on the contents of the June 22, 1989 memorandum or to determine whether the items in it did or did not constitute just cause for Charbon's termination. This complaint is not about just cause. It is about whether or not any part of the motivation for the termination constitutes a breach of section 80(1) of the CCBA. We are not satisfied that it did. Accordingly, this complaint is dismissed.

0047-89-G; 0170-89-R The Ontario Council of the International Brotherhood of Painters and Allied Trades, Applicant v. **W.G. Gallagher Construction Limited,** Respondent; Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, District Council 46, Applicants v. W.G. Gallagher Construction Co. and W.G. Gallagher Construction Limited, Respondents

Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where congent reason for request not provided to Board - Proceeding adjourned *sine die*

BEFORE: *Louisa M. Davie,* Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw.*

DECISION OF THE BOARD; June 5, 1990

1. We have received and granted a request to adjourn the hearing in this matter scheduled for May 28, 1990. Although we granted the adjournment, in the circumstances of this case, we consider it appropriate to deliver more than the Board's usual "consent adjournment" decision.

2. On April 7, 1989, the applicant referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination pursuant to section 124 of the *Labour Relations Act* ("the Act"). In its reply to the referral of this grievance the respondent W.G. Gallagher Construction Limited ("Gallagher") denied it was bound to a collective agreement with the Ontario Council of the International Brotherhood of Painters and Allied Trades ("Painters").

3. On April 19, 1989, counsel for the Painters filed an application pursuant to section 63 and section 1(4) of the Act (Board File 0170-89-R) involving the same parties to this grievance. By letter dated April 19, 1989, counsel requested, *inter alia*, that Board File 0170-89-R and this matter be consolidated.

4. In a letter received by the Board on April 20, 1989, counsel for Gallagher wrote:

> We are writing to request that the hearing scheduled for April 21, 1989 be adjourned on consent of the parties.
>
> We would like to ask the Board to reschedule this matter on either May 18 or 23 or June 13, 1989.

5. To accommodate the parties the Board scheduled this matter together with Board File 0170-89-R to be heard on May 18, 1989. By the letter delivered to the Board at 5:16 p.m. on May 16, 1989 the parties advised that they had:

> ... agreed to adjourn the hearing on the above matter scheduled for May 18, 1989. We request that the Board reschedule this matter for July 13, 1989.

6. The Board rescheduled the hearing for July 13, 1989. The hearing proceeded as scheduled. By decision of the Board dated November 2, 1989 the application brought pursuant to section 63 and 1(4) was dismissed.

7. By letter delivered to the Board on January 10, 1990, counsel for the Painters requested:

> ... that the Board schedule these matters for continuation dates for hearing in order to hear and determine the issues outstanding in these proceedings, including those referred to above in consultation with the parties.

8. In consultation with the parties a hearing for March 7, 1990 was scheduled. The parties were so advised by letter from the Board dated January 24, 1990.

9. During the week of February 26th to March 2nd, counsel for the Painters telephoned the Registrar's Assistant to suggest that the parties were not available on March 7, 1990 and requested that the Board provide the parties with other dates that the panel was available. Counsel was provided with alternative dates of May 14, 15 and 28, June 11, 12, 18 and 19, 1990. The request for an adjournment of the March 7, 1990 date was ultimately confirmed by fax sent to the Board at 4:27 p.m. on March 6, 1990, when counsel for Gallagher advised:

> This will confirm our telephone conversation with your office today wherein we advised that the above-noted matter, which has been scheduled to continue on March 7, 1990, will be adjourned *sine die*, on consent.

10. On March 19, 1990 counsel for the Painters telephoned the Board to request that this matter be rescheduled. The dates of May 28, 1990, September 19 and 20, 1990 were provided to counsel.

11. On March 20, 1990, in consultation with the parties, the matter was rescheduled for May 28, 1990. On March 26, 1990, counsel for the Painters wrote:

> We request that the Board schedule the above-captioned matter for hearing.
>
> The parties have agreed that this matter could proceed to hearing on May 28, 1990 and we appreciate the co-operation of the Board in scheduling this matter for hearing on that date.

12. By letter from the Board dated March 28, 1990, the parties were notified that the matter was rescheduled to May 28, 1990.

13. By letter dated May 23, 1990 but not delivered to the Board until 4:54 p.m. on May 24, 1990, counsel for the Painters wrote:

> The parties to the above matter request an adjournment of the hearing scheduled for Monday, May 28, 1990.

14. By telex to the parties on May 25, 1990, the Board advised that the matter had been adjourned.

15. This chronology indicates that on at least three separate occasions the parties have agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them. On each occasion counsel provided only minimal notice to the Board of their agreement to adjourn the scheduled date. In light of the lack of reasonable notice the Board was unable to schedule any other case to be heard in place of this matter. Indeed we note that had counsel's last letter actually been delivered on Wednesday, May 23, 1990 rather than very late afternoon the following day the Board would have had an opportunity to take that matter into account in doing its scheduling for the week of May 28, 1990.

16. The circumstances of this case are such that the Board considers it appropriate to

remind parties appearing before the Board, and their counsel, of the institutional concern of the Board. Unlike a private Board of Arbitration where the party litigants choose the arbitrator and bear the cost of litigation, the Board's mandate is to serve a broad-based community.

17. In scheduling matters, including grievances in the construction industry, the Board must balance not only the interests of specific litigants in a case to have their matter heard as soon as possible, but also the rights and interests of all the other parties to cases before the Board to have their matters heard and disposed of in an equally expeditious fashion.

18. In *560742 Ontario Ltd. c.o.b. Canada Framing*, [1990] OLRB Rep. May 490 the Board wrote:

> 6. We do wish to point out, however, that the Board has limited resources. Naturally, the Board is concerned that these not be squandered. It appears that some counsel (we do not suggest that counsel for the applicant is one of them) and some parties have formed the view that they control the Board's processes. And it has in fact been the Board's general practice to accommodate parties which have agreed to an adjournment. When matters can be adjourned within a reasonable time prior to a scheduled hearing, the Board is often able to schedule another matter in its stead or, in circumstances where a hearing has been scheduled to be held at other than the Board's own premises (for example), to otherwise conserve its resources. Where, however, the Board does not learn of a proposed adjournment within a reasonable time prior to the scheduled date for hearing, it is often not possible to both schedule another matter for that day and give reasonable notice to the parties involved in that other matter. It is, of course, impossible to do so if the adjournment is "requested" the day before or the morning of a scheduled hearing. Last minute adjournments can also cause the Board to incur unnecessary expenses.
>
> 7. Consequently, when adjournments are not requested in a timely manner, the limited resources of the Board, which are financed by the taxpayers of this province, are squandered. That is something which must be avoided, if possible. Consequently, counsel and parties should turn their minds to whether an adjournment will be necessary at the earliest opportunity.
>
> 8. Neither counsel nor parties to proceedings before the Board should delude themselves. They do not control the practices and procedures of the Board. Subject to the provisions of the *Labour Relations Act*, the rules of natural justice, and the requirements of fairness, the Board is the master of its own practice and procedure. Parties who fail to request an adjournment, either on consent or otherwise, in a timely manner, risk not being granted an adjournment. Certainly, parties and their counsel should not assume that a request of the kind received by the Board in this proceeding (with respect to the April 17, 1990 hearing date) will be granted as a matter of course.

19. With those comments we concur. We wish to add only that where, as here, the parties fail to provide any reason for their request to adjourn the hearing other that their "agreement", the Board may be left with the impression that the only reason for the adjournment request is to accommodate individual scheduling difficulties of the parties or their counsel. In circumstances where the parties fail to provide any reason in their letter requesting an adjournment i.e. parties are pursuing settlement discussion, a party, counsel or subpoenaed witnessed is ill and therefore unable to attend, etc., there is an increased risk that the adjournment will not be granted.

20. This proceeding is adjourned *sine die* for a period not exceeding one year from the date hereof. If no party requests, in writing, that the matter be scheduled for hearing within that one year period and the matters are not otherwise disposed of by the Board, the applications will be dismissed.

COURT PROCEEDINGS

2018-88-U; 2019-88-U; 3122-88-U (Court File No. 325/90) Plaza Fiberglas Manufacturing Limited, Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd. and Sabina Citron, Applicants, v. Ontario Labour Relations Board and United Steelworkers of America, Respondents

Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

Board Decision found at [1990] OLRB Rep. Feb. 192.
High Court of Justice, Weekly Court, Montgomery J., May 22, 1990:

Montgomery J. (endorsement): Application is dismissed with costs to the Union only. Brief reasons to follow.

The applicant has failed to satisfy me that there is a strong *prima facie* case of jurisdictional error. The area of complaint involves application & interpretation of the Board's constituent statute. Because of a strong privative clause there cannot therefore be jurisdictional error unless the decision is patently unreasonable and cannot be rationally supported.

The Boards order to compensate applicant falls squarely under Sec. 89 of the O.L.R.A.

Ms. Eberts concern about double payment because of the order of the Employment Standards Tribunal is premature. This in essence was addressed by the OLRB in its award when it addressed mitigation.

I see no irreparable harm to the applicant by a denial of the stay.

The application for these reasons is dismissed.

1321-88-U; 1430-88-G (Court File No. 825/89) Todd Ramsay Interiors Inc. and James R. Todd, Applicants v. United Brotherhood of Carpenters and Joiners of America, Local 93 and The Ontario Labour Relations Board, Respondents

Adjournment - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

Board Decisions dated March 16, 1989 and June 22, 1989 (unreported)
High Court of Justice, Divisional Court, O'Driscoll, Carrruthers and McRae JJ., June 20, 1990:

O'Driscoll J.: Application is dismissed; we see no need to call upon counsel for the Union or the O.L.R.B.

We see no merit in the application - the applicant was notified and chose not to appear in person or by counsel on the appointed day. He was aware from the Board's letter that if no one appeared the Board might proceed. The applicant answered that by saying that he would not accept the Board's decision if it proceeded in his absence.

The applicant to pay the costs of the Union assessed on a party/party basis.

The O.L.R.B. does not asks for costs and none are awarded.

2740-89-FC; 3167-89-R; 0697-90-FCA (Court File No. 1463/90) Randy Burke, Applicant v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W. - Canada), **Venture Industries Limited,** and Ontario Labour Relations Board, Respondents

First Contract Arbitration - Judicial Review - Practice and Procedure - Stay - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

Board decision dated March 27, 1990 (unreported) and Board decision dated May 31, 1990 reported at [1990] OLRB Rep. May 625.
Supreme Court of Ontario, Weekly Court, McKeown J., June 21, 1990:

McKeown J.: The applicant Randy Burke requests leave to bring his application for judicial review in the High court of Justice, and if leave is granted, he requests an order setting aside the Ontario Labour Relations Board's decisions of March 27, 1990, and May 31, 1990. Furthermore, he requests a stay of the Board's efforts to settle by arbitration a first collective agreement.

On March 15, 1989, the respondent union C.A.W. was certified by the respondent Ontario Labour Relations Board as the collective bargaining agent for the employees of the respondent Venture Industries Canada Limited, located in Wallaceburg, Ontario. On February 8, 1990, the union asked the Board to impose a first contract by arbitration, pursuant to s.40a(1) of the *Labour Relations Act*, R.S.O. 1980, c.228, as amended by 1986, c.17. Hearings on this request occurred in front of a panel of the Board between February 19 and March 22, 1990. On March 27, 1990, the panel released its decision, which directed that a first contract would be imposed by arbitration.

However, unknown to the panel and prior to the panel's March 27 1990, decision, the applicant Burke had filed with the Board a request that the Board declare that the union no longer represents the employees. Section 57(1) of the Act permits such a request if the union has not signed a collective agreement within one year of the union's certification as the employees' bargaining agent. The one-year period expired on March 15, 1990, and the applicant mailed his request to the Board on March 20, 1990. According to the Board's rules, this request was deemed to have been filed on March 20, 1990. Thus the application was filed prior to the release of the Board's decision of March 27, 1990.

Where the Board has in front of it both an application for first contract arbitration and an application for termination of bargaining rights, s.40a(22) of the *Labour Relations Act* requires the Board to

> ... consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

After the release of their March 27, 1990, decision, the panel of the Board was informed of the previously-filed application for termination of bargaining rights. The panel decided to allow the parties to make submissions on the termination application. After hearing submissions, the panel made its May 31, 1990, decision. This subsequent decision determined that the Board was authorized by s.106 of the Act to reconsider its earlier decision. Then, the panel proceeded to reconsider its earlier decision, taking into account the termination application. The panel concluded, in accordance with its own jurisprudence, that the first contract application should proceed first. The panel then invoked s.40a(22) of the Act in order to dismiss the termination application.

On June 19, 1990, the Board commenced its hearings to determine the nature of the first contract to be imposed by arbitration. The applicant and the employer asked the board for an adjournment so that an application for judicial review could be made. The Board denied the request. The employer then declined to attend the Board's hearings.

The next day, on June 20, the applicant Burke applied for judicial review of the Board's decisions of March 27, 1990, and May 31, 1990, and for a stay of the Board's first contract proceedings pending the Court's decision. The applicant asks for leave to make his application in front of a single judge of the High Court of Justice.

This application raises the following issues:

1. Should leave be granted to proceed in the High Court?

2. Should the decisions be set aside?

3. Should the Board's proceedings be stayed pending the Court's review?

1. Should leave be granted to proceed in the High Court?

Section 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1980, c.224, allows that an application for judicial review may be brought in front of a single judge of the High Court sitting in Weekly Court. Subsection (3) allows for the case to be transferred to the Divisional Court.

> 6. - ...
>
> (2) An application for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.
>
> (3) Where a judge refuses leave for an application under subsection (2), he may order that the application be transferred to the Divisional Court.

Thus the applicant Burke may be granted leave to proceed with his application in Weekly Court if he can demonstrate that his application is urgent and that a failure to proceed would likely involve a failure of justice: *Re United Headwear, Optical and Allied Workers Union of Canada, Local 3 et al. and Biltmore/Stetson (Canada) Inc. et al.* (1983), 41 O.R. (2d) 287 (H.C.J.) at 292; rev'd on other grounds, 43 O.R. (2d) 243 (C.A.).

Burke submitted that his application is urgent, since there would be a six-month delay before it could be heard in the Divisional Court. He said that this six-month delay would be a failure of justice, since by then the Ontario Labour Relations Board will have imposed a first contract and it will then be more difficult for the employees to rid themselves of the union.

The respondent Board submitted that leave to proceed in Weekly Court should be denied, since the applicant had produced no evidence of urgency. The Board submitted that this application involves no special facts that show this application to be urgent: see, for example, *Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al.* (1977), 17 O.R. (2d) 448 (H.C.J.) at 449.

I agree this application is not urgent. I do not see that there would be any failure of justice if the application is heard by the Divisional Court in six months. Leave is therefore denied. I order the application to be transferred to the Divisional Court.

2. Should the decisions be set aside?

Because I have denied the request for leave to proceed in Weekly Court, there is no need for me to decide the merits of the application.

3. Should the Board's proceedings be stayed pending the Court's review?

Section 4 of the *Judicial Review Procedure Act*, *supra*, permits the court to impose any interim order pending the court's final decision on the application. The applicant Burke requests the court

to impose an interim stay of the Ontario Labour Relations Board's first contract arbitration proceedings.

The applicant submitted that he is entitled to a stay if he can show that *prima facie* his application for judicial review will ultimately succeed: *Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al.*, *supra*, at 451. The respondent Board submitted, and I agree, that when deciding whether to stay a decision of the Board pending an application for judicial review, the principles to be applied are those applicable to an interim injunction. Thus the onus is on the applicant to establish that he has a strong *prima facie* case, that irreparable harm will occur to the applicant if the stay is refused and that the balance of convenience lies in favour of the applicant: *Knob Hill Farms Limited v. Ontario Labour Relations Board*, a judgment of the Ontario Divisional court, delivered May 30, 1988, at p.3; *Westburne Industrial Enterprises Ltd. v. Teamsters Local Union No. 419*, a judgment of the Ontario Divisional Court, delivered May 16, 1985, at p.3; *Consolidated Bathurst v. International Woodworkers of America, Local 2-69* (1984), 2 O.A.C. 227 (Div. Ct.) at 229; *Wells Fargo Armcar Inc. v. Ontario Labour Relations Board* (1981), 34 O.R. (2d) 99 (H.C.J.) at 102-103.

The applicant submitted that it has a *prima facie* case, since both the March 27, 1990, and May 31, 1990, decisions of the Board were erroneous and made without jurisdiction. The March 27 decision was erroneous since it failed to consider the termination application. The May 31 decision was erroneous since it was impossible for the Board to "reconsider" a decision that it failed to make in the first place; i.e. the Board could not "reconsider" its earlier decision about the priority of the two applications since the Board had made no decision on this issue in the earlier decision. Another way to put the applicant's submission is to say that the Board failed to do what the *Labour Relations Act* required it to do: *R. v. Ontario Labour Relations Board, ex parte Hannigan et al.* (1967), 64 D.L.R. (2d) 117 (Ont. C.A.).

The respondent Board made convincing submissions on why a stay should be refused in this case. These submissions were supported by the union. I agree with the Board's submissions that the applicant has failed to present a strong *prima facie* case. The Board relied on the two privative clauses, sections 106 and 108, in the *Labour Relations Act*, which restrict the court's ability to interfere with the decisions of the Ontario Labour Relations Board. The courts have strongly cautioned against judicial interference with a specialized tribunal charged with administering its constituent statute. This policy has been called "curial deference". Dickson J., in *C.U.P.E. v. New Brunswick Liquor Commission* (1979), 97 D.L.R. (3d) 417 (S.C.C.) at 424, said:

> The rationale for protection of a labour board's decision within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The policy of "curial deference" is particularly applicable to judicial review of the Board's procedures. The Board has a special expertise in labour relations matters, and based on its experience has established its own procedures: *Re Cedarvale Tree Services Ltd. and Labourers International Union*, [1971] 3 O.R. 832 (C.A.) at 841; *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400 (Div. Ct.) at 404. It is unlikely that an applicant requesting a stay will be able to establish a strong *prima facie* case of entitlement to relief: *Wells Fargo Armcar Inc. v.*

Ontario Labour Relations Board et al., a judgment of the Ontario Divisional Court, delivered January 22, 1982, at p.4.

I agree that this court should show curial deference to the Board's internal procedures. In this case s.106 of the *Labour Relations Act* clearly gives the Board the authority to reconsider its own decisions. I therefore conclude that it is within the authority and expertise of the Board to decide its procedures for reconsidering its own decisions. Thus the applicant does not have a strong *prima facie* case.

As well, the Board submitted the applicant will not suffer irreparable harm if the stay is refused. The only effect on the applicant would be that he would have the benefit of a collective agreement. This would not cause him harm, but to the contrary would give him the benefit of better working conditions. The respondent employer submitted that a stay should be granted since without it the employer would be caused irreparable harm if the first contract increases the employees' wages. However, I find this to be an irrelevant consideration. The employer is a third party to this application. Irreparable harm is a reason for imposing a stay only if the harm is suffered by the applicant. The applicant, however, could not point to any evidence that it would suffer irreparable harm. I find that the applicant would not be irreparably harmed if a stay is refused.

In considering the balance of convenience to the parties, the court must consider how delay will affect the parties, since, as Estey J.A. said, labour relations delayed are labour relations denied: *Re The Journal Publishing Company of Ottawa Limited et al. and the Ottawa Newspaper Guild et al.*, [1977] 1 A.C.W.S. 817 (Ont. C.A.), cited in *Tandy Electronics Limited (Radio Shack) v. United Steelworkers of America and the Ontario Labour Relations Board* (1980), 80 C.L.L.C. 14,016 (Ont. Div. Ct.) at 82.

The applicant submitted that the balance of convenience lies in its favour, since it is incongruous for a contract to be imposed when judicial review may ultimately remove the contact: see *Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al.*, *supra*, at 452. However, I agree with the Board's submission that a stay would delay, and therefore likely defeat, the employees' right to have a collective agreement. Thus the balance of convenience lies in favour of the respondent Board and union. This is yet another reason for not imposing a stay in this case.

I note that in the following cases the requests for a stay were refused: *Knob Hill Farms Limited v. Ontario Labour Relations Board and United Food and Commercial Workers Union Local 206 et al.* (1988), *supra*; *Westburne Industrial Enterprises Ltd. v. Teamsters Local Union No. 419* (1985), *supra*; *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 and Ontario Labour Relations Board* (1984), *supra*; *Re Thames Steel Construction Ltd. and Labourers International Union of North America et al.*, a judgment of the Ontario Divisional Court, delivered October 21, 1980. In the following earlier cases, the requests for a stay were granted: *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America and the Ontario Labour Relations Board* (1980), *supra*; *Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al.* (1977), *supra*.

For all these reasons, I deny the request for a stay of the Board's proceedings on the first contract arbitration.

Conclusion

Leave is denied to bring this application in front of a single judge of the High Court. The application is transferred to the Divisional Court. The request for an interim stay of the proceedings of the Ontario Labour Relations Board is refused. Venture Industries Canada Limited, the Ontario

Labour Relations Board and the Attorney-General do not seek costs. There will be no costs to the respondent union from the applicant in the cause.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2199-88-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Rison Construction & Engineering Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

2678-88-R: Labourers' International Union of North America, Local 506 (Applicant) v. Gottcon Contractors Ltd., Gottardo Properties Ltd., Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Ltd., Gottardo Holdings Company Ltd., Gottardo Management Ltd., and Gottardo Corporation (Respondents) v. Bricklayers, Masons Independent Union of Canada, Local 1 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and those masons' or bricklayers' tenders in bargaining units for which any trade union held bargaining rights as of January 27, 1989" (34 employees in unit)

0711-89-R: Service Employees Union, Local 183 (Applicant) v. Famous Players Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week at the Place de Ville cinemas, 300 Spark Street, Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and projectionists" (24 employees in unit) (*Having regard to the agreement of the parties*)

0734-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. B.J. Laverty Construction Sebringville Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1013-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Arnott Construction Ltd. and Arnott Building Systems (Collingwood) Inc. (Respondents)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (45 employees in unit)

1236-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Arnott Construction Ltd. and Arnott Building Systems (Collingwood) Inc. (Respondents)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (42 employees in unit)

1263-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Arnott Construction Ltd. and Arnott Building Systems (Collingwood) Inc. (Respondents)

Unit: "all construction labourers in the employ of the respondent in the County of Grey in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1524-89-R: United Steelworkers of America (Applicant) v. Community Lifecare Inc. - c.o.b. as Community Nursing Home and Villa Fatima/Palais (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Alexandria, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office, and clerical staff, and students employed during the school vacation period" (63 employees in unit)

2704-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Black Stallion Manufacturing Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2738-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. Peter Tenute Plumbing (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2765-89-R: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Applicant) v. Suvar Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Superior Varnish and Drier Division, in the Township of Puslinch, save and except foremen, persons above the rank of foreman, office and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

2779-89-R: Ontario Public Service Employees Union (Applicant) v. 510034 Ontario Inc. c.o.b. as Larch Radiological Services (Respondent)

Unit #1: "all employees of the respondent in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, the bookkeeper, the secretary to the President, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (37 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2 (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

2956-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cuneo Interiors (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3128-89-R: Association of Allied Health Professionals: Ontario (Applicant) v. Renfrew County & District Board of Health (Respondent) v. Group of Employees (Objectors)

Unit #1: "all paramedical employees of the respondent in Renfrew County and District, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of March 10, 1990" (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all paramedical employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in Renfrew County and District, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for whom any trade union held bargaining rights as of March 10, 1990" (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3189-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Property Management Ltd. (Respondent)

Unit: "all employees of the respondent engaged in cleaning at 16 and 24 The Links Road in the Municipality of Metropolitan Toronto, save and except the property manager, persons above the rank of the property manager and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

3197-89-R: International Association of Machinist & Aerospace Workers (Applicant) v. Peacock Inc. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors or foremen, persons above the rank of supervisor or foreman, office, clerical and sales staff, and students employed during the school vacation period" (42 employees in unit) (*Having regard to the agreement of the parties*)

3255-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. C. M. Superior Drywall & Painting Co. Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, com-

mercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

3262-89-R: United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Pano Cap Canada Ltd. (Respondent)

Unit: "all employees of the respondent in Kitchener, save and except foremen, persons above the rank of foreman quality control supervisor, office, clerical and sales staff and persons regularly employed for not more than 24 hours per week" (52 employees in unit) (*Having regard to the agreement of the parties*)

3293-89-R: Service Employees Union, Local 183 (Applicant) v. Gibson Holdings (Ontario) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Ernestown, save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses" (58 employees in unit) (*Having regard to the agreement of the parties*)

3294-89-R: Canadian Union of Public Employees (Applicant) v. Highview-Wilson Child Care Centre (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the Director and persons above the rank of Director" (9 employees in unit) (*Having regard to the agreement of the parties*)

3295-89-R: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Home of Canada Ltd. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Harriston, save and except Assistant Director of Nursing, and persons above the rank of Director of Nursing" (3 employees in unit) (*Having regard to the agreement of the parties*)

0012-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The West Parry Sound Board of Education (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the District of Parry Sound, save and except Controllers, persons above the rank of Controller, the Senior Accounting Clerk, the Executive Secretary and Secretary to the Superintendents" (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0020-90-R: Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. Morrison Lamothe Inc. (Respondent)

Unit: "all employees of the respondent at its Fine Foods Division in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office staff, management trainees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (97 employees in unit) (*Having regard to the agreement of the parties*)

0053-90-R: Ontario Public Service Employees Union (Applicant) v. Timmins Handicapped Residence Action Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the Regional Municipality of Timmins, save and except co-ordinators, persons above the rank of co-ordinator, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Regional Municipality of Timmins regularly employed for not more than 24 hours per week, save and except co-ordinators, persons above the rank of co-ordinator, and office and clerical employees" (8 employees in unit) (*Having regard to the agreement of the parties*)

0054-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. London Cribbing Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0063-90-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Dundas - Jafine Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

0066-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Turn-Key Installations Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0070-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Charterways Transportation Ltd. (Respondent)

Unit #1: "all employees of the respondent in Ajax, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, school bus drivers, mechanics and maintenance staff and persons regularly employed for not more than 24 hours per week" (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Ajax, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, school bus drivers, transit drivers, school bus mechanics and maintenance staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

0091-90-R: United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. T.C.C. Bottling Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office, and clerical staff, and students employed during the school vacation period" (29 employees in unit) (*Having regard to the agreement of the parties*)

0101-90-R: Bakery, Confectionery & Tobacco Workers' International Union, Local 403 (Applicant) v. Weston Bakeries Ltd. (Kingston Division) (Respondent)

Unit: "all production employees of the respondent in the City of Kingston regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and persons employed as security guards" (31 employees in unit) (*Having regard to the agreement of the parties*)

0113-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Simcoe County Board of Education (Respondent)

Unit: "all continuing education instructors and literacy instructors employed by the respondent in the County of Simcoe, save and except the Administrators of continuing education and literacy programmes and employees in bargaining units for which any trade union held bargaining rights as of April 10, 1990" (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0122-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Comet Environmental Erosion Services Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0134-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Hastings County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Hastings, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (45 employees in unit)

0139-90-R: United Steelworkers of America (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: "all employees of the respondent at and out of the Township of Richmond, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week" (34 employees in unit) (*Having regard to the agreement of the parties*)

0162-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Golden Mill Bakery Inc. (Respondent)

Unit #1: "all employees of the respondent in the City of Hamilton, save and except foremen, persons above the rank of foreman, office and clerical staff, route servicemen and transport drivers and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Hamilton employed as route servicemen and transport drivers, save and except supervisors, persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

0172-90-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Brabant Newspapers Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Province of Ontario, save and except publisher, secretary to the publisher, managing editor, secretary to the managing editor, production manager, assistant to the production manager, production foreman, advertising manager, operations manager, real estate buyers guide manager, circulation manager, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units (specifically editorial employees (1) and production employees (2)) for whom the Southern Ontario Newspaper Guild Local 87 The Newspaper Guild held bargaining rights flowing from a voluntary recognition agreement dated December 8, 1989, covering production and a certificate dated January 19, 1988 covering editorial department" (90 employees in unit) (*Having regard to the agreement of the parties*)

0200-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Medeiros Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and

Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0222-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent)

Unit: "all employees of the respondent in the City of Ottawa employed as psychologists, psychometrists, physiotherapists, occupational therapists, social services workers (social workers) and mental health workers, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for whom any trade union held bargaining rights as of April 23, 1990" (47 employees in unit) (*Having regard to the agreement of the parties*)

0223-90-R: Local 164 Draftsmen's Association of Ontario International Federation of Professional & Technical Engineers, A.F.L. (Applicant) v. Consumers Packaging Inc. (Respondent)

Unit: "all designers checkers, designers draftspersons, and detail draftspersons, in the employ of the respondent at 2070 Hawden Road in Mississauga, save and except drafting supervisors, persons above the rank of drafting supervisor, and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

0244-90-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Angelica Uniform of Canada, Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Lindsay, save and except forepersons, persons above the rank of foreperson, office, sales and clerical staff" (54 employees in unit) (*Having regard to the agreement of the parties*)

0268-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Charterways Transportation Ltd. (Respondent)

Unit: "all employees of the respondent in Ajax, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, school bus drivers, transit drivers, transit mechanics and maintenance staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

0315-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Campbell-Cox Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0333-90-R: Ontario Public Service Employees Union (Applicant) v. The Sampson House Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Gananoque, save and except supervisors, and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2525-89-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all Continuing Education instructors employed by the respondent as Adult English as a Second Language Instructors and Adult Basic Education Instructors in he City of Toronto, save and except Lead Instructors and Supervisors, persons above the rank of Lead Instructor and Supervisor, and employees in bargaining

units for which any trade union held bargaining rights as of January 15, 1990" (599 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	592
Number of names of persons on revised voters' list	615
Number of persons who cast ballots	259
Number of segregated ballots cast by persons whose names appear on voters' list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	18
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	180
Number of ballots marked against applicant	49
Ballots segregated and not counted	29

2880-89-R: United Steelworkers of America (Applicant) v. Mirolin Industries Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (281 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	261
Number of persons who cast ballots	249
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	165
Number of ballots marked against applicant	82

2891-89-R: Canadian Union of Public Employees (Applicant) v. Riverside Hospital of Ottawa (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener #1) v. Independent Canadian Transit Union (Intervener #2)

Unit: "all clerical employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of February 22, 1990, being the date of application" (110 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	110
Number of persons who cast ballots	53
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	11

2972-89-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Cadillac Fairview Corporation Ltd. (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all employees of the respondent in the Urban Development Group at the Eaton Centre in Metropolitan Toronto, save and except superintendent, persons above the rank of superintendent, office, clerical and sales staff, security staff, professional engineers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (41 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	43
Number of persons who cast ballots	26
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	24
Number of ballots marked in favour of intervener	1

2988-89-R: Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd. (Respondent) v. United Paperworkers International Union, Local 92 (Intervener)

Unit: "all employees of the respondent at its mill in Fort Frances, save and except supervisor, persons above the rank of supervisor, office, clerical, sales and woodlands staff, watchmen and security guards and employ-

ees for whom another trade union holds bargaining rights as of May 7, 1990" (352 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	352
Number of persons who cast ballots	304
Number of spoiled ballots	235
Number of ballots marked in favour of applicant	235
Number of ballots marked in favour of intervener	69

3037-89-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Pickering Hydro-Electric Commission (Respondent) v. Utility Workers of Canada (Intervener)

Unit: "all employees of the Pickering Hydro-Electric Commission at Pickering, Ontario, save and except supervisors and forepersons, persons above the rank of supervisors and forepersons; confidential secretaries to the General Manager, the Director of Operations and the Director of Finance; Senior Accounting Clerk and Distribution Co-ordinator; persons employed for not more than 24 hours per week; persons employed on a government sponsored program; students employed during the school vacation period; and students employed on a co-operative training program" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	37
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	23
Number of ballots marked in favour of intervener	11

3213-89-R: Canadian Paperworkers Union (Applicant) v. Abitibi-Price Inc. (Respondent) v. United Paperworkers International Union (Intervener)

Unit: "all employees of the Company in its Provincial Papers Division at its Georgetown Mill on all matters pertaining to rates of pay, hours of work, or other working conditions, save and except foremen, persons above the rank of foremen, office and sales staff, Engineering Department, Technical Control Department and Watchmen" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	38
Number of persons who cast ballots	37
Number of ballots marked in favour of applicant	20
Number of ballots marked in favour of intervener	17

3280-89-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens Queens A Division of Chateau Gardens Corporation (Respondent) v. London & District Service Workers Union, Local 220 (Intervener)

Unit: "all employees of the respondent at its nursing home in London, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, registered and graduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	20
Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	8

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2555-89-R: Teamsters, Local Union 938 (Applicant) v. G.G.S. Plastic Engineering Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Brampton, save and except supervisors, persons above the rank of

supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (55 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	57
Number of persons who cast ballots	53
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	23

2779-89-R: Ontario Public Service Employees Union (Applicant) v. 510034 Ontario Inc. c.o.b. as Larch Radiological Services (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in the Regional Municipality of Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, the bookkeeper and the secretary to the President" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

2265-89-R; 2266-89-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Ontario Jockey Club (Respondent) v. Service Employees International Union, Local 204, affiliated with the A. F. of L., C.I.O., C.L.C. (Intervener) (86 employees in unit)

3066-89-R: United Steelworkers of America (Applicant) v. H & H Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors) (22 employees in unit)

3277-89-R: IWA - Canada (Applicant) v. Pharmacie Lemaire Inc. (Respondent) (18 employees in unit)

0190-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Thunder Bay Northland Machinery (1987) Ltd. (Respondent) (8 employees in unit)

0259-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. A. Santos Carpenters, 683354 Ontario Ltd. (Respondent) (2 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2881-89-R: United Steelworkers of America (Applicant) v. Dorel Industries Inc. (Respondent) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Intervener)

Unit: "all employees of the respondent at its Ridgewood Industries Division in Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (112 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	112
Persons directed by the Registrar to receive segregated ballots, the names of these persons to remain on the list pending Board's decision as to their eligibility	12
Number of persons who cast ballots	105
Number of ballots marked in favour of applicant	28
Number of ballots marked in favour of intervener	69

Ballots segregated and not counted	7

3170-89-R: Canadian Paperworkers Union (Applicant) v. Dominion Cellulose Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto and the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff, security guards, plant nurse, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (410 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	411
Persons challenged by applicant	18
Persons added to voters' list on consent of parties	1
Number of names of persons on revised voters' list	412
Number of persons who cast ballots	389
Number of ballots excluding segregated ballots, cast by persons whose names appear on voters' list	376
Number of segregated ballots cast by persons whose names appear on voters' list	13
Number of ballots marked in favour of applicant	106
Number of ballots marked against applicant	270

3214-89-R: Graphic Communications International Union, Local N-1 (Applicant) v. Laurentian Newspapers Ltd. (Respondent)

Unit: "all employees of the respondent at its Uxbridge Printing Division in the Town of Uxbridge, save and except forepersons, persons above the rank of foreperson, office, sales, editorial and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	27
Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	14
Ballots segregated and not counted	5

3279-89-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens Queens A Division of Chateau Gardens Corporation (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of the respondent in London, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	27
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	8

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1842-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lakeside Plastics Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Sandwich South, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (84 employees in unit)

Number of names of persons on list as originally prepared by employer	74
Number of names of persons on revised voters' list	73
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	38

2805-89-R: United Steelworkers of America (Applicant) v. Tul Safety Equipment Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Hawkesbury, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, technical staff, and quality control personnel" (79 employees in unit)

Number of names of persons on list as originally prepared by employer	86
Persons struck off list on consent of parties	7
Number of persons who cast ballots	75
Number of ballots excluding segregated ballots, cast by persons whose names appear on voters' list	74
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	51
Ballots segregated and not counted	1

2841-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Corrweb Litho Inc. and Corrado Graphics Ltd. (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the respondents in Brampton Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	15
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	14
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	12

2869-89-R: Energy & Chemical Workers Union (Applicant) v. Children's Playgrounds Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Peterborough, save and except forepersons, persons above the rank of foreperson, and office and sales staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	22
Number of names of persons on revised voters' list	27
Number of persons who cast ballots	24
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	22
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	13
Ballots segregated and not counted	2

Applications for Certification Withdrawn

1385-89-R: Union of Labour Representatives of Ontario (Applicant) v. Brotherhood of Maintenance of Way Employees (Respondent)

1747-89-R; 1923-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Archie Greco Paving Ltd. (Respondent) v. Greco Paving Ltd. Employees Association (Intervener)

2983-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

0102-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. D'Angelo Plastering Co. Ltd. (Respondent) v. O.P.C.M.I.A., Local 124 Ottawa Ontario (Intervener)

0128-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Moose Lodge, Chapter 1205 (Respondent)

0140-90-R: United Steelworkers of America (Applicant) v. Michael Borkavich Drugs Ltd., o/a Shoppers Drug Mart Store #670 (Respondent)

0161-90-R: Teamsters,. Local No. 419 (Applicant) v. Domcor - Division of Domco Industries Ltd. (Respondent)

0170-90-R: Christian Labour Association of Canada (Applicant) v. Ray of Hope Inc. (Respondent)

0202-90-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Sandwich South (Respondent)

0325-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Vuteq Canada Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1569-89-FC: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Applicant) v. Northfield Metal Products Ltd. (Respondent) (*Dismissed*)

2229-89-FC: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Hillview Farms Ltd. (Respondent) (*Granted*)

3006-89-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Peacock Lumber Ltd. (Respondent) (*Granted*)

0079-90-FC: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673 (Applicant) v. Bourque Consumer Electronics Service Inc. (Respondent) (*Granted*)

0252-90-FC: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cultural Woodtech Inc. (Respondent) (*Granted*)

0253-90-FC: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. 568127 Ontario Inc. c.o.b. as Ultramar Carpentry & Finishing (Respondent) (*Granted*)

0357-90-FC: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. N.A. Carpenters Ltd. (Respondent) (*Withdrawn*)

0358-90-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. New-Vision Renovations (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0821-88-R: Tactix Construction Ltd. (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (*Dismissed*)

0239-89-R: Toronto Typographical Union, Number 91, Printing, Publishing & Media Workers Sector of the Communications Workers of North America (Applicant) v. Innopack Inc. Progressive Packaging Ltd., Condo Laminations (Respondents) (*Granted*)

1851-89-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Baker Investments Ltd., L.D. Warren Contractors Inc., Shelby Investments Inc., Velar Investments Ltd., and Lake Road Manufacturing Corporation Ltd. (Respondents) (*Granted*)

2456-89-R: Canadian Transport Workers Union (Applicant) v. Listowel Transport Lines Ltd., J.E. Transport Ltd., J.E. Transport Inc., Tricity Cartage & Delivery Ltd., and London Cartage & Delivery Ltd. (Respondents) (*Withdrawn*)

2688-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. L.R. Lawrence Renovations Ltd. and L.R. Lawrence Construction Ltd. (Respondents) (*Granted*)

3047-89-R: Toronto Typographical Union, #91 (Applicant) v. Cooper & Beatty Ltd., Headliners of Canada, Identicolour/Pinwheel, L'Excellence, Art & Design Studios Ltd., and Bozell Palmer Bonner (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1851-89-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Baker Investments Ltd., L.D. Warren Contractors Inc., Shelby Investments Inc., Velar Investments Ltd., and Lake Road Manufacturing Corporation Ltd. (Respondents) (*Granted*)

2455-89-R: Canadian Transport Workers Union (Applicant) v. Listowel Transport Lines Ltd., J.E. Transport Ltd., J.E. Transport Inc., Tricity Cartage & Delivery Ltd., and London Cartage & Delivery Ltd. (Respondents) (*Withdrawn*)

2687-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. L.R. Lawrence Renovations Ltd. (Respondent) (*Withdrawn*)

3047-89-R: Toronto Typographical Union, #91 (Applicant) v. Cooper & Beatty Ltd., Headliners of Canada, Identicolour/Pinwheel, L'Excellence, Art & Design Studios Ltd., and Bozell Palmer Bonner (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2025-89-R: Jari Tchir (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Respondent) v. The Hudson's Bay Company (Intervener)

Unit: "all office and clerical employees employed by the intervener at its retail stores at Kitchener, Ontario who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Personnel and office manager, Senior/General Clerk, and persons above the

rank of Personnel and office manager, students employed on a cooperative program with a school, college or university" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Granted*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	4

2121-89-R: A Group of Employees employed by Kitchener Beverages Ltd. (Applicant) v. United Food & Commercial Workers International Union (Respondent) v. Kitchener Beverages Ltd. (Intervener)

Unit: "all employees of Kitchener Beverage Limited, in the City of Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period" (76 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	73
Number of persons who cast ballots	71
Number of ballots marked in favour of respondent	35
Number of ballots marked against respondent	36

2296-89-R: Sheila Morey (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Respondent) v. Sears Canada Inc. (Intervener)

Unit: "all office and clerical employees of the respondent at its service centre in the City of Kingston, regularly employed for not more than 24 hours per week and students employed as office and clerical employees during the school vacation period at the service centre in Kingston, save and except foremen, managers, supervisors, persons above the rank of foreman, manager and supervisor, security staff, personnel department staff and management trainees" (35 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	12
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	12

2614-89-R: Margaret Barbara Rainey (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (12 employees in unit) (*Dismissed*)

2615-89-R: Karla McIntosh (Applicant) v. United Food & Commercial Workers Union, Local 633 (Respondent) (8 employees in unit) (*Dismissed*)

2727-89-R: David Mikel and Group of Employees (Applicants) v. Glass, Molders, Pottery, Plastics & Allied Workers (Respondent) v. Northfield Metal Products Ltd. Employer, (Intervener)

Unit: "all employees of Northfield Metal Products Ltd. in the City of Waterloo, save and except foremen, persons above the rank of foremen, office and sales staff" (250 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	250
Persons struck off list on consent of parties	21
Persons (other than those referred to in Item 2) removed from voters' list on consent of parties	2
Number of names of persons on revised voters' list	227
Number of persons who cast ballots	210
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	204
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	72
Number of ballots marked against respondent	136

2980-89-R: Aiden White (Applicant) v. Sheet Metal Union in Berlozzi Roofing (Respondent) v. Berlozzi Roofing & Sheet Metal (Employer) (*Dismissed*)

3099-89-R: Donna Crouse (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Respondent) v. Barmish Inc. (Intervener) (27 employees in unit) (*Dismissed*)

3169-89-R: Eduardo Tacuri (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 of Hotel Employees Restaurant Employees International Union (Respondent) (*Withdrawn*)

3198-89-R: Mark Gillespie (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. B. Maskell Ltd. (Intervener) (*Withdrawn*)

3209-89-R: Workers of Regency Manor Nursing Home Ltd. - Local 1032 of U.R.W. (Applicant) v. United Rubber, Cork, Linoleum & Plastic Workers of America (Respondent) (*Withdrawn*)

3212-89-R: Peter Britton (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Urbandale Building Corporation Ltd. (Intervener) (3 employees in unit) (*Dismissed*)

3274-89-R: Employees of 571252 Ontario Ltd. c.o.b. as Wawa Motor Inn c/o Frances J. Lamothe (Applicant) v. United Steelworkers of America on behalf of itself and Local 9246 (Respondent) v. Wawa Motor Inn (571252 Ontario Limited) (Employer) (40 employees in unit) (*Granted*)

3281-89-R: Blackburn Loeb IGA Employees (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Blackburn Hamlet Loeb IGA (Intervener) (117 employees in unit) (*Dismissed*)

0005-90-R: David Lawrence Moore and Seco Tools Canada Inc. (Applicants) v. Local 567, CWC (Respondent) (1 employees in unit) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3105-89-U: Canadian Union of Labour Employees (Applicant) v. Public Service Alliance of Canada (Respondent) (*Withdrawn*)

3245-89-U: Toronto Transit Commission (Applicant) v. Amalgamated Transit Union, Local 113; R. Hutchinson, W. Reardon, et al. (Respondents) (*Withdrawn*)

0241-90-U: General Motors of Canada Ltd. (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), CAW Local 222 and certain named employees (Respondents) (*Granted*)

0389-90-U; 0390-90-U: Komdresco Canada Inc. (Applicant) v. United Steelworkers of America, Local 5475 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2657-89-U: Sarnia Construction Association (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, J. Maloney and M. McCabe (Respondents) (*Withdrawn*)

0158-90-U: International Brotherhood of Painters & Allied Trades, District Council No. 46 and Harrison-Muir Ltd. (Applicants) v. Labourers' International Union of North America, Local 183 (Respondent) v. G. Tari Ltd. (Intervener #1) v. P. Rogers & Company Ltd. (Intervener #2) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0432-90-U; 0433-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673 (Applicant) v. Bourque Consumer Electronics Service Inc. and Mr. Pierre Bourque (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0474-88-U: International Union of Operating Engineers, Local 865 (Complainant) v. Canadian Pacific Forest Products Ltd. (Respondent) (*Granted*)

2200-88-U: United Brotherhood of Carpenters & Joiners of America, Local 38 (Complainant) v. Rison Construction & Engineering Ltd. (Respondent) (*Dismissed*)

0240-89-U: Toronto Typographical Union, Number 91, Printing, Publishing & Media Workers Sector of the Communications Workers of North America (Complainant) v. Innopac Inc., Progressive Packaging Ltd., Condor Laminations (Respondents) (*Dismissed*)

1008-89-U: Laundry & Linen Drivers & Industrial Workers, Union 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Roytec Vinyl Ltd. (Respondent) (*Withdrawn*)

1014-89-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Arnott Construction Ltd. and Arnott Building Systems (Collingwood) Inc. (Respondents) (*Withdrawn*)

1196-89-U: United Steelworkers of America (Complainant) v. McKeough Sons Co. Ltd. (Respondent) (*Withdrawn*)

1504-89-U: Dennis Leonard (Complainant) v. Ontario Nurses' Association (Respondent) v. Mount Sinai Hospital (Intervener) (*Withdrawn*)

1518-89-U: Professor Uday Singh (Complainant) v. Laurentian University Faculty Association (Respondent) (*Dismissed*)

1733-89-U: Alliance Employees' Union (Complainant) v. Public Service Alliance of Canada (Respondent) (*Withdrawn*)

1751-89-U: John Thompson (Complainant) v. United Electrical Radio & Machine Workers (Local 523) (Respondent) (*Withdrawn*)

1782-89-U: Ontario Public Service Employees Union (Complainant) v. Ontario Dairy Herd Improvement Corporation (Respondent) (*Withdrawn*)

1847-89-U: Canadian Union of Public Employees and its Local 2998D (Complainant) v. University Settlement Recreation Centre (Respondent) (*Withdrawn*)

1869-89-U: Naeem H. Quareshi (Complainant) v. Canadian Union of Public Employees, Local 2001 (Respondent) v. Toronto General Hospital (Intervener) (*Dismissed*)

1945-89-U: Canadian Food Workers' Union (Complainant) v. Primo Foods Ltd. and Frank Saliani, Nicola Bartolomeo, Tonio Masciarelli and Massimo Sggignoli (Respondents) (*Withdrawn*)

2254-89-U: Arthur Arboine (Complainant) v. International Brotherhood of Electrical Workers (IBEW), Local 530 (Respondent) (*Withdrawn*)

2258-89-U: Service Employees Union, Local 210 Affiliated with Service Employees' International Union, AFL-CIO-CLC (Complainant) v. Bruce-Grey-Owen Sound Health Unit (Respondent) (*Withdrawn*)

2333-89-U: Elizabeth Gierasimczuk (Complainant) v. United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC: (Respondent) v. Royce Dupont Poultry Packers (Intervener) (*Dismissed*)

2386-89-U: Great Lakes Fishermen & Allied Workers Union (G.L.F.A.W.U.) now National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 444 (Complainants) v. Franklin Fishery A Division of E.D.F. Holdings Inc. (Respondent) (*Withdrawn*)

2424-89-U: Ontario Public Service Employees Union (Complainant) v. Thames Valley Ambulance (Respondent) (*Withdrawn*)

2441-89-U: Mike Petryshen (Complainant) v. Work Wear Corporation of Cda. Ltd. (Respondent) (*Withdrawn*)

2447-89-U: Ontario Public Service Employees Union (Complainant) v. Niagara South Board of Education (Respondent) (*Withdrawn*)

2493-89-U: IWA-Canada, Local 2693 (Complainant) v. Atway Transport Inc. (Respondent) (*Withdrawn*)

2543-89-U: Rudolph M. Henry, et al. (Complainants) v. CAW National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (Respondent) v. Caterpillar of Canada Ltd. (Intervener) (*Withdrawn*)

2545-89-U: Lori Mathias (Complainant) v. Windsor Plastic Products Ltd. (Respondent) (*Withdrawn*)

2557-89-U: Canadian Union of Public Employees (Complainant) v. St. Jacques Nursing Home (Respondent) (*Withdrawn*)

2558-89-U: Jill L. Bettes Member CAW, Local 673 (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, Local 673 and its Officers, Bill Mackie, Iain Farqueson, Dawn Cartwright and John Clarke (Respondents) (*Withdrawn*)

2560-89-U; 2561-89-U; 2562-89-U: Ontario Public Service Employees Union (Complainant) v. The Religious Hospitallers of St. Joseph Health Centre, Cornwall, Ontario (Respondent) (*Withdrawn*)

2588-89-U: International Brotherhood of Electrical Workers, Local 804 (Complainant) v. K. Schmitt Electric Ltd. (Respondent) (*Withdrawn*)

2596-89-U: Mme. Mireille Lanthier (Complainant) v. Canadian Union of Public Employees, Local 1967; Hawkesbury District General Hospital (Respondents) (*Withdrawn*)

2627-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

2659-89-U: Janusz Czerniecki (Complainant) v. Samuel Bingham Ltd.; Larry Woodhouse, G.C.I.U. and G.R. (Gord) Churchill (Respondents) (*Withdrawn*)

2661-89-U: Retel Jackson (Complainant) v. Mary Jane Large (Respondent) v. Service Employees' International Union, Local 204 (Intervener) (*Withdrawn*)

2692-89-U: Ontario Nurses' Association (Complainant) v. St. Vincent de Paul Hospital (Respondent) (*Withdrawn*)

2800-89-U: 715329 Ontario Ltd. c.o.b. as Gallant Painting (Complainant) v. International Brotherhood of Painters & Allied Trades, Local 1590 (Respondent) (*Dismissed*)

2827-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Kautex of Canada Inc. (Respondent) (*Withdrawn*)

2882-89-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Complainant) v. Thomson Newspaper Company Ltd. (Respondent) (*Withdrawn*)

2910-89-U: Teamsters Local Union No. 879 (Complainant) v. Hamilton Modular Buildings Inc. (Respondent) (*Withdrawn*)

2913-89-U: Ontario Secondary School Teachers' Federation (Complainant) v. The Board of Education for the City of Windsor (Respondent) (*Withdrawn*)

2920-89-U; 2921-89-U: United Food & Commercial Workers International Union, Local 633 (Complainant) v. 567356 Ontario Inc. c.o.b. as Fisher Street I.G.A. (Respondent) (*Withdrawn*)

2921-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 567356 Ontario Inc. c.o.b. as Fisher Street I.G.A. (Respondent) (*Withdrawn*)

2948-89-U: Ontario Secondary School Teachers' Federation (Complainant) v. The Hearst Board of Education (Respondent) (*Withdrawn*)

2957-89-U: Service Employees' Union, Local 210 affiliated with Service Employees' International Union, AFL-CIO-CLC (Complainant) v. The Religious Hospitallers of Hotel Dieu of St. Joseph of the Diocese of London (Respondent) (*Withdrawn*)

2962-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Pharmaphil Corporation (Respondent) (*Withdrawn*)

2976-89-U: Mary Ann Carruthers (Complainant) v. Retail, Wholesale & Department Store Union, AFL:CIO:-CLC & Dominion & A & P Food Stores Ltd. (Respondents) (*Withdrawn*)

2978-89-U: Ontario Public Service Employees Union (Complainant) v. Larch Radiological Services Ltd. and Cambrian Radiological Services Ltd., and Northern Radiological Services Ltd. (Respondents) (*Withdrawn*)

2979-89-U: Herb James (Complainant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees (Respondent) v. Ault Foods Ltd. (Intervener) (*Withdrawn*)

2986-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Kautex of Canada Inc. (Respondent) (*Withdrawn*)

2998-89-U: William H. Gazer (Complainant) v. Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261 (Respondent) (*Withdrawn*)

2999-89-U: Michael David Clark (Complainant) v. Labourers' International Union of North America, Local 607 (Respondent) (*Withdrawn*)

3014-89-U: David M. Stein (Complainant) v. International Union of Operating Engineers (Respondent) (*Withdrawn*)

3021-89-U: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Complainant) v. Universal Glass & Aluminum (Respondent) (*Granted*)

3023-89-U; 3024-89-U; 3039-89-U: IWA-Canada, Local 2693 (Complainant) v. Paramount Transportation Ltd. (Respondent) (*Withdrawn*)

3038-89-U: Jamie Russo (Complainant) v. Steve Chung Foods Inc. (Respondent) (*Withdrawn*)

3042-89-U: Triple A Union of Drivers & General Workers, Local 333 affiliated with Energy & Chemical Workers Union (Complainant) v. Amcon Management Inc. (Respondent) (*Withdrawn*)

3078-89-U: Stephen J. Munn (Complainant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

3090-89-U: Judy Watts, Wanda Wiseman, Janice McDonald, Sharon MacRae (Complainants) v. C.U.P.E. Union and Marg Patterson Union President (Respondents) (*Withdrawn*)

3101-89-U; 3187-89-U: Graphic Communications International Union, Local 500M (Complainant) v. Cliff & Walters Lithographing Co. Ltd. (Respondent) (*Granted*)

3102-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. A.R. Clark & Co. Ltd. (Respondent) (*Withdrawn*)

3106-89-U: Canadian Union of Labour Employees (Complainant) v. Public Service Alliance of Canada (Respondent) (*Withdrawn*)

3132-89-U: Aclo Compounders Inc. (Complainant) v. United Steelworkers of America, Local 8716 (Respondent) (*Withdrawn*)

3143-89-U: Jose Gumabon (Complainant) v. CFAW, Local 530 (Respondent) (*Withdrawn*)

3145-89-U: Hotel, Motel & Restaurant Employees Union, Local 442 (AFL-CIO-CLC) (Complainant) v. Maple Leaf Village Investments Inc. (Respondent) (*Withdrawn*)

3173-89-U: United Steelworkers of America (Complainant) v. Tul Safety Equipment Ltd. (Respondent) (*Withdrawn*)

3202-89-U: Frank Ramjattan (Complainant) v. Retail, Wholesale Bakery & Confectionery Workers' Union, Local 461 (Respondent) (*Withdrawn*)

3215-89-U: Alain Cadieux (Complainant) v. IUOE 796 Celine Castenguay (Respondent) (*Withdrawn*)

3221-89-U: Ron Edwards (Complainant) v. USWA, Local 8782 (Respondent) (*Withdrawn*)

3241-89-U: Clifton A. Wright (Complainant) v. (Union Chairperson) Phillip Paul (Respondent) (*Withdrawn*)

3243-89-U: Mark Garrett (Complainant) v. Glenn Coopman (President C.U.P.E. 149 Local) (Respondent) v. The Board of Education for the City of Scarborough (Intervener) (*Withdrawn*)

3248-89-U: Fatima Nogueira (Complainant) v. Maria Terra and SEIU, Local 204 (Respondents) (*Withdrawn*)

3252-89-U: Gary Walt (Complainant) v. A.F.L.C.I.O., Local 96 (Respondent) (*Withdrawn*)

3278-89-U; Mrs. Sukhvinder Tiwana (Complaint) v. Hotel Employees & Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)

3288-89-U: IWA - Canada, Local 1-2995 (Complainant) v. Maison Renaissance Inc. (Respondent) (*Withdrawn*)

3291-89-U: Hotel Employees & Restaurant Employees Union, Local 604, OFL., CIO., CLC., (Complainant) v. 564002 Ontario Ltd., c.o.b. as Trent Inn Hotel (Respondent) (*Withdrawn*)

0006-90-U: Robert Cloutier (Complainant) v. Unions of the United Food & Commercial Workers International Union (Local 387), and Eastcan Bottling Ltd. (Respondent) (*Withdrawn*)

0017-90-U: Harvey Hartog (Complainant) v. A City Window Repair & Labourers' International Union of North America, Local 837 (Respondents) (*Withdrawn*)

0041-90-U: William Egan (Complainant) v. International Brotherhood of Painters & Allied Trades, Local 1832 (Respondent) (*Withdrawn*)

0064-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 496458 Ontario Ltd. o/a Journey's End Motel, London (Respondent) (*Withdrawn*)

0074-90-U: Barbara S. Dewar (Complainant) v. Office & Professional Employees International Union, Local 343 (Respondent) (*Withdrawn*)

0075-90-U: Monique Jean-Louis (Complainant) v. Mrs. G. Myer-Cadieux (Respondent) (*Withdrawn*)

0076-90-U: Andrew Smith (Jr.) (Complainant) v. Ron Springall, A. J. Sherman, and U.F.C.W. (Respondents) (*Withdrawn*)

0077-90-U: E.B. Eddy Forest Products Ltd. (Complainant) v. Canadian Paperworkers Union, CLC and its Wm H. Burnell, Local 74; Mr. Omar Daviau; Mr. Tim Akey, et al (Respondents) (*Withdrawn*)

0093-90-U: Service Employees Union, Local 663 (Complainant) v. Lennox & Addington Addiction Services (Respondent) (*Withdrawn*)

0095-90-U: United Food & Commercial Workers International Union, AFL:CIO:CLC: (Complainants) v. Krug Furniture Inc. (Respondent) (*Withdrawn*)

0103-90-U: Energy & Chemical Workers Union (Complainant) v. Children's Playgrounds Inc. (Respondent) (*Withdrawn*)

0129-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Muller's Meat's Ltd. (Respondent) (*Withdrawn*)

0147-90-U: Service Employees Union, Local 183 (Complainant) v. Applefest Lodge Retirement Home (Respondent) (*Withdrawn*)

0149-90-U: Carla Maddalena (Complainant) v. S.E.I.U. (Service Employees International Union), Local 204 (Respondent) v. Edyth Wood (Intervener) (*Withdrawn*)

0163-90-U: Labourers' International Union of North America, Local 1036 (Complainant) v. Burnac Corporation (Respondent) (*Withdrawn*)

0169-90-U: Energy & Chemical Workers Union (Complainant) v. United Way of Sarnia Lambton (Respondent) (*Withdrawn*)

0204-90-U: Tom Pitts (Complainant) v. Bosal Canada Inc. (Respondent) (*Withdrawn*)

0208-90-U: Frank Rotundo (Complainant) v. Panex Show Service (Respondent) (*Dismissed*)

0235-90-U: Rene Ledger (Complainant) v. Transportation Communication Union (Respondent) (*Withdrawn*)

0236-90-U: Margaret Wylie (Complainant) v. Jim Clancy (OPSEU) (Respondent) (*Dismissed*)

0237-90-U: Sham Mohammed (Complainant) v. Amalgamated Transit Union (Respondent) v. Corporation of the City of Brampton (Intervener) (*Withdrawn*)

0245-90-U: Amalgamated Clothing & Textile Workers Union (Complainant) v. Angelica Uniform of Canada Ltd. (Respondent) (*Withdrawn*)

0286-90-U: Joseph Jankovics (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

0317-90-U: Sheldon Smith (Complainant) v. James White (Respondent) (*Withdrawn*)

0340-90-U: Nicholas Turcotte (Complainant) v. Maple Drywall (Respondent) (*Dismissed*)

0383-90-U: Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. Berto's Restaurant Inc. (Respondent) (*Dismissed*)

0413-90-U: Helen Petzos (Complainant) v. Brevel Motors of Canada (Respondent) (*Dismissed*)

0496-90-U: Mechanical Contractors Association - Ontario (Complainant) v. Vollmer & Associates, Contractors Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

3238-89-M: Gordon A. L. Sutter (Applicant) v. Communications & Electrical Workers of Canada (CWC), Local 549, and Granada Canada Ltd. (Respondents) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1585-88-JD: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Complainant) v. E.S. Fox Ltd., Pro Insul Ltd., Sheet Metal Workers' International Association, Local 562 (Respondents) v. Ontario Sheet Metal Workers' & Roofers' Conference (Intervener #1) v. Ontario Sheet Metal & Air Handling Group (Intervener #2) v. Master Insulators' Association of Ontario Inc. (Intervener) (*Dismissed*)

1131-89-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 765 (Complainant) v. Webb-Stiles Company & Ledow Co. Inc. (Respondent) v. Millwright District Council of Ontario United Brotherhood of Carpenters & Joiners of America, on its own behalf and on behalf of its Local 1410 (Intervener) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2643-89-M: London & District Service Workers' Union, Local 220 (Applicant) v. Waverley Mansion (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1959-89-OH; 1960-89-OH: Canadian Union of Public Employees, Local 87 (Applicant) v. Corporation of the City of Thunder Bay (Respondent) (*Dismissed*)

2382-89-OH: Mike Raymond, C.A.W. National Health & Safety Co-Ordinator, Chrysler, on behalf of Gievors: R. Taylor, M. St. Pierre, D. Leader, A. Lovrecich and R. Knight (Complainants) v. R. Buzzeo, Supervisor, Pillette Rd. Truck Assembly Plant, Chrysler Canada, Phil Bezaire, Personnel Manager, Pillette Rd. Truck Assembly Plant, Chrysler Canada (Respondents) (*Withdrawn*)

2425-89-OH: Norman Larocque & John Rinehart (Complainants) v. Thames Valley Ambulance (Respondent) (*Withdrawn*)

2970-89-OH: Kenneth O. Barry (Complainant) v. Boyle Midway (Respondent) (*Withdrawn*)

0345-90-OH: Elio Mordini (Complainant) v. PCL Constructors Eastern Inc. (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCE

0675-85-M: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Concrete Column Clamps (C.C.C) Ltd., Bona Building & Construction Ltd., Bona Building & Management Company Ltd. and Fix Fast Ltd./Lteüe. (Respondents) (*Granted*)

2367-87-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. The Corporation of the City of Etobicoke (Respondent) (*Withdrawn*)

1011-88-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) (*Dismissed*)

1455-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Four Seasons Drywall (Respondent) (*Dismissed*)

2691-88-G; 1929-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. 615949 Ontario Ltd., c.o.b. Eagle Contracting Ltd. (Respondent) *Granted*)

0384-89-G: International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. Robertson-Yates Corporation Ltd. (Respondent) (*Withdrawn*)

0672-89-G: International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. Barclay Construction Hamilton Ltd. (Respondent) v. Labourers' International Union of North America, Local 837 (Intervener) (*Withdrawn*)

0766-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

0856-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Landis & Gyr Powers Ltd. c.o.b. as MCC - Powers (Respondent) (*Withdrawn*)

1850-89-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Baker Investments Ltd., L.D. Warren Contractors Inc., Shelby Investments Inc. (Respondents) (*Withdrawn*)

2083-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Northern Reinforcing Products Ltd. (Respondent) (*Withdrawn*)

2102-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Withdrawn*)

2196-89-G: Christian Labour Association of Canada (Applicant) v. Marlee Electric Co. (Respondent) (*Dismissed*)

2222-89-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Frank Jonkman & Sons Ltd. (Respondent) (*Withdrawn*)

2329-89-G, 2330-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. L.R. Lawrence Renovations Ltd. (Respondent) (*Granted*)

2367-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pavex Canada Ltd. (Respondent) (*Granted*)

2540-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.M.F. Carpentry Ltd. (Respondent) (*Withdrawn*)

2541-089-G: Labourers' International Union of North America, Local 1036 (Applicant) v. City Block (Respondent) (*Withdrawn*)

2568-89-G: International Union of Bricklayers & Allied Craftsmen, Local 1 (Applicant) v. Astrol Masonry Ltd. (Respondent) (*Granted*)

2814-89-G: Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 504 (Applicants) v. Comstock Canada (Respondent) (*Withdrawn*)

2820-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mauro Carpentry Co. (Respondent) (*Withdrawn*)

2863-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Canron Inc. (Respondent) (*Withdrawn*)

2868-89-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Internorth Construction Company Ltd. (Respondent) (*Withdrawn*)

2931-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Rex Forming Ltd. (Respondent) (*Withdrawn*)

2961-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. D. Dixie Drywall (Respondent) (*Granted*)

2966-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Claude Leblanc Cartage Ltd. (Respondent) (*Granted*)

2967-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Concrete Pumping Ltd. (Respondent) (*Withdrawn*)

2971-89-G: Ontario Sheet Metal Workers, Local Union 30 (Applicant) v. Master Clad Inc. (Respondent) (*Withdrawn*)

2993-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93, John Nash & Andrew Root (Applicants) v. Concrete Column Clamps (C.C.C.) Ltd. (Respondent) (*Granted*)

3083-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Phoenix Industries (Respondent) (*Withdrawn*)

3141-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cancian Brothers Ltd. (Respondent) (*Withdrawn*)

3144-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. 859006 Ontario Inc. c.o.b. as Res-Erection (Respondent) (*Withdrawn*)

3146-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Concrete Pumping Ltd. (Respondent) (*Granted*)

3175-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. D'Angelo Plastering Ltd. (Respondent) (*Withdrawn*)

3183-89-G: Christian Labour Association of Canada (Applicant) v. Shar-Dee Contracting Ltd. (Respondent) (*Withdrawn*)

3184-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Magine Contractor Inc. (Respondent) (*Withdrawn*)

3185-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Aldershot Contractors Equipment Rental Ltd. (Respondent) (*Withdrawn*)

3186-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. C & P Lafontaine Excavating Ltd. (Respondent) (*Granted*)

3195-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. George & Asmussen Ltd. (Respondent) (*Withdrawn*)

3208-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Freedom Valley Design Inc. Structural Division (Respondent) (*Withdrawn*)

3222-89-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Canadian Escalator & Elevator Service Co. Ltd. (Respondent) (*Withdrawn*)

3226-89-G: Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario on behalf of All Contractor Members of the Electrical Contractors Association Quinte-St. Lawrence, and the Electrical Contractors Association Quinte-St. Lawrence (Applicants) v. International Brotherhood of Electrical Workers, and the International Brotherhood of Electrical Workers Construction Council of Ontario, and the International Brotherhood of Electrical Workers, Local 115 (Respondents) (*Withdrawn*)

3230-89-G: Marble, Tile, Terrazzo & Helpers Union, Local 31 (Applicant) v. Versatile Contracting, a Division of 726846 Ontario Ltd. (Respondent) (*Granted*)

3268-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America, (Applicant) v. Rae Brothers Inc. (Respondent) (*Withdrawn*)

3298-89-G: International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Roko Construction Ltd. (Respondent) (*Withdrawn*)

3299-89-G: International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. I&K Painting & Decorating (759760 Ontario Ltd.) (Respondent) (*Granted*)

3300-89-G: International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Frank Maceroni Painting & Decorating (Respondent) (*Withdrawn*)

0026-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Halton Forming Ltd. (Respondents) (*Granted*)

0027-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Mur-Wal Forming Inc. (Respondents) (*Granted*)

0028-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Orta Forming & Const. Ltd. (Respondents) (*Granted*)

0029-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Parkwall Forming Ltd. (Respondents) (*Granted*)

0030-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Co. Ltd. (Respondent) (*Granted*)

0031-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Malnic Contracting Inc. (Respondent) (*Granted*)

0032-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Baccardi Foundations Ltd. (Respondent) (*Granted*)

0033-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and A.R.G. Construction Corporation (Respondents) (*Granted*)

0034-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Cedar Forming Ltd. (Respondents) (*Granted*)

0035-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Greenwall Forming Ltd. (Respondents) (*Granted*)

0036-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Peel Forming Ltd. (Respondents) (*Granted*)

0037-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Poured Wall Corp. Ltd. (Respondents) (*Granted*)

0038-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Toronto Zenith Contracting (1982) Ltd. (Respondents) (*Granted*)

0039-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity and Tru-Wall Group Ltd. (Respondents) (*Granted*)

0045-90-G: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Electrical Contractors Association of Quinte-St. Lawrence, Bay Electric Company, K.R. McGowan Electric Ltd., J.S. Electric (1989) Ltd., Ontario Electrical Construction Company Ltd., and Ed. Malette Electric Ltd. (Respondents) (*Withdrawn*)

0061-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. C A S Interiors (Respondent) (*Withdrawn*)

0072-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Melita Carpenters (Respondent) (*Granted*)

0088-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. G. M. F. Carpentry Ltd. (Respondent) (*Withdrawn*)

0099-90-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. City Interior Company (*Granted*)

0105-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Sun Plumbing & Mechanical Ltd. (Respondent) (*Granted*)

0117-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Nelson Concrete Cutting Inc. (Respondent) (*Withdrawn*)

0125-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Farmer Fabrication Ltd. (Respondent) (*Granted*)

0157-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. I.M.S. Construction Ltd. (Respondent) (*Granted*)

0177-90-G: The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario on behalf of K.R. McGowan Electric Ltd. and J.S. Electric (1989) Ltd. and the Electrical Contractors Association of Quinte-St. Lawrence (Applicants) v. International Brotherhood of Electrical Workers, Local 115 (Respondent) (*Withdrawn*)

0231-90-G; 0232-90-G; 0233-90-G: Labourers' International Union of North America, Local 493 (Applicant) v. R. M. Belanger Const. Ltd. (Respondent) (*Withdrawn*)

0242-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. I.P.C.F. Properties Inc. (Respondent) (*Withdrawn*)

0243-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Withdrawn*)

0262-90-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Hi-Lo Insulation (Respondent) (*Withdrawn*)

0263-90-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Landar Insulation Corp. Ltd. (Respondent) (*Withdrawn*)

0264-90-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Western Industrial Services Ltd. (Respondent) (*Withdrawn*)

0277-90-G: International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. Preston & Lieff Glass Contracts Inc. (Respondent) (*Granted*)

0288-90-G: Labourers' International Union of North America, Local 837 (Applicant) v. Cardeen Construction Ltd. (Respondent) (*Withdrawn*)

0298-90-G: Millwrights District Council of Ontario (Applicant) v. Remote Millwright Services (Respondent) (*Withdrawn*)

0299-90-G: Millwrights District Council of Ontario (Applicant) v. Sexton's Mechanical (Respondent) (*Withdrawn*)

0331-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Delta Electric Eastern Ltd. (Respondent) (*Granted*)

0334-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Terron Mechanical Ltd. (Respondent) (*Granted*)

0342-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. John T. Hepburn Ltd. (Respondent) (*Withdrawn*)

0356-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Canron Inc. (Respondent) (*Withdrawn*)

0373-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cancian Brothers Ltd. (Respondent) (*Withdrawn*)

0411-90-G: Labourers' International Union of North America, Local 837 (Applicant) v. Dufferin Construction Co., a Division of St. Lawrence Cement Ltd. (Respondent) (*Withdrawn*)

0418-90-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Westroyal Carpentry Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0565-89-R: United Steelworkers of America (Applicant) v. Blue Bell Canada Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1244-89-G; 1325-89-G; 1326-89-G; 1327-89-G: United Brotherhood of Carpenters & Joiners of America, Locals 785, 1316, 2486 (Applicants) v. Helm Interiors Ltd. (Respondent) (*Dismissed*)

0286-90-U: Joseph Jankovics (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

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